Pornography and Prostitution in Canada

Report of the Special Committee on Pornography and Prostitution

Volume 1

Canada

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Special Committee on Pornography and Prostitution

February, 1985

The Honourable John Crosbie, P.C., M.P.,
Minister of Justice and
Attorney General of Canada

Dear Mr. Crosbie,

As required by the Terms of Reference assigned in June, 1983, we have inquired into and hereby report to you upon the problems associated with pornography and prostitution in Canada.

In the course of our work, we have received the valuable assistance of a number of the departments and agencies of the government of Canada, including, most particularly, the Department of Justice. In addition, we have been assisted by suggestions received from hundreds of Canadians who made presentations at the Committee's public hearings, or otherwise gave us the benefit of their views.

The recommendations contained in this Report contemplate comprehensive legal change to deal with the effects of pornography and prostitution. Just as important are the recommendations that are addressed to the need for social change and understanding in order that the very causes of the problems can be understood and remedied.

The members of the Committee have considered it a privilege to have undertaken this work.

We respectfully submit our recommendations.

Susan M. Clarke

Susan Clark

Mary Eberts

Mary Eberts

Jean Paul Gilbert

Jean-Paul Gilbert

John P.S. McLaren

John McLaren

Andrée Ruffo

Andrée Ruffo
(Dissenting on the
Subject of Adult
Prostitution)

Joan Wallace

Joan Wallace

Paul Fraser, Q.C.
Chairman

Preface

In a free society, basic questions about how people are required to behave and how they are entitled to express themselves, rank among the most important to be asked. They are also among the most difficult to answer. The answers to these fundamental questions, asked by each generation of Canadians, have ultimately defined our freedom and our responsibilities.

This Committee has been in pursuit of answers to these questions in the mid-1980s, and this Report is the product of our work. It is a digest of what we were told, and what we were able to find out; and, it is a product of compromises forged by seven people with differing backgrounds and experiences.

In a sense, the very fact that we were asked to discuss these issues publicly says something about this generation. Perhaps it was the reluctance of preceding generations to talk openly, or at all, about some of the manifestations of human sexuality that caused subjects such as pornography and prostitution to be whispered about, and not discussed.

We have been privileged to have discussions with Canadians. The concerns about pornography and prostitution are serious ones involving the dignity and equality of people and an appreciation of the depth and variety of human affection. We found that there was a developed and a developing interest in the two issues, not so much because they have confounded legislators, but because the practice of prostitution and the presence of pornography are clear manifestations of our contemporary society.

In the course of this Report we attempt to fairly record all sides of the debate and, at the same time, to reflect the intensity of feeling that we encountered.

In areas as complex as these it is difficult to be certain about anything. On one issue, however, we are certain: the answers to the problems raised by pornography and prostitution in Canada are not just legal answers. They are to be found, instead, in the social order of things and in the way in which Canadians practise the equality, dignity and respect that our Constitution enshrines.

To the extent we have succeeded in the performance of our responsibilities, credit is due to a number of people whom we wish to acknowledge.

We thank those hundreds of Canadians who prepared for and attended our public hearings. Their interest not only encouraged us, but confirmed that Canadians did, indeed, want a public forum to discuss these subjects.

The Committee is grateful to the Deputy Minister of Justice, Roger Tassé for his encouragement and valuable support. We also wish to thank Daniel Sansfaçon for his capable assistance in co-ordinating the empirical research commissioned by the Department of Justice and for his co-operation in the production of this Report.

Many people have assisted in the legal research that is reflected in this Report. We are particularly indebted to Professor Robin Elliot of the University of British Columbia Law School who has been the Committee's legal researcher and who also directed the work of several student assistants: Robert Grant, David Butcher, Birgit Eder, Michelle Reynolds, Terry Abelsen, Jane Ingman-Baker, Kay Vidall and Richard Brunton, all from the University of British Columbia Law School.

David Nobbs, Osgoode Hall, assumed major responsibility for analyzing the written submissions to the Committee and International Conventions dealing with pornography and prostitution. Cameron Duff, University of Windsor Law School and Diane Ryan, Fanshawe College, provided valuable assistance with legal research projects. In addition, the Committee benefitted from the work or counsel of Professors Diane Pask and Chris Levy of the University of Calgary Law School, Mr. David Porter of Toronto, and Professor John Heinz of the Department of Philosophy, University of Calgary.

The, Committee's secretary, Robin Jamieson, undertook general responsibility for administration. She managed our office, organized the public hearings and co-ordinated our publications. Her assistance was invaluable.

We have had the benefit of the administrative assistance of Carolyn Partridge and Rosemary Newman of Vancouver, and Deborah Walker of Toronto. The word processing leading to the production of this report was cheerfully and patiently provided by Cecelia Klassen, Tana Nicholson, Sandra Dyrndahl and Gloria Henry of Vancouver. We are also grateful to the members of the library staff at our respective offices and universities.

All Committee members have assumed responsibilities for the writing or production of the report. While Susan Clark, Mary Eberts, John McLaren, Joan Wallace and I have written the Report, Jean-Paul Gilbert and Andrée Ruffo have willingly taken on the task of overseeing the translation and production of the french language version.

Finally, the Committee would like to record its special appreciation to those who made it possible for us to have been a part of this Committee for the past 20 months. We could not have functioned without the support and understanding of our families and those with whom we work. We give particular thanks to those colleagues who willingly took on extra responsibilities in our absence and by so doing, allowed us to undertake the work of the Committee.

While we gratefully acknowledge all the assistance which has been given to us, any short-comings in the Report are, of course, the sole responsibility of the Committee.

Paul Fraser
Vancouver, British Columbia
February, 1985.

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Part I

Section I.

General Introduction

Chapter 1

The Work of the Committee

1. Establishment of the Committee

1.1 Terms of Reference and Mandate

In the last decade, the contemporary realities of pornography and prostitution have been the subject of increasing public debate in Canada. With conflicting descriptions of the problems, have come equally conflicting views of the social and legal solutions. There have been sharp lines of division in the debate. Few other social issues have so divided our public's opinion.

If Canadians have been unable to agree on exactly what should be done and why, there seems at least to be agreement that it should be done quickly and clearly.

In June, 1983, the Government of Canada established the Special Committee on Pornography and Prostitution to report to the Minister of Justice. The Committee was asked to study the problems associated with pornography and prostitution and to carry out a program of socio-legal research in support of our work.

Our specific terms of reference were:

1. to consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada;
2. to consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters;
3. to ascertain public views on ways and means to deal with these problems by inviting written submissions from concerned groups and citizens and by conducting meetings in major centres across the country;
4. to consider the experience and attempts to deal with these problems in other countries, including the U.S., European

Economic Community and selected Commonwealth countries such as Australia and New Zealand;

5. to consider alternatives, report findings and recommend solutions to the problems associated with pornography and prostitution in Canada.

1.2 Members of the Committee and Staff

SUSAN CLARK	is a Sociologist, and Dean of Human and Professional Development and Director of the Institute for the Study of Women, Mount St. Vincent University, Halifax, Nova Scotia.
MARY EBERTS	B.A., LL.B., LL.M., is a partner in the Toronto law firm Tory, Tory, DesLauriers & Binnington, and practises civil litigation. She is co-editor of *Equality Rights under The Canadian Charter of Rights and Freedoms* and serves on the board of the Canadian Civil Liberties Association and of the Metro (Toronto) Action Committee on Public Violence Against Women and Children.
JEAN-PAUL GILBERT	B.A., M.A. (Criminology) is Senior Board member (Quebec Region) National Parole Board; Director of the Montreal Police Department 1964-1969; President Quebec Society of Criminology 1978-1984.
JOHN McLAREN	is a Professor of Law at the University of Calgary. He was previously Dean of Law at the University of Windsor, as well as at the University of Calgary. His teaching and research interests lie in the field of Canadian legal history and accident compensation. He is a member of the Ontario Bar.
ANDRÉE RUFFO	B.A., B.Ed., LL.B. M.Ed., is a barrister and solicitor in private practice in Montreal, working mainly in family law and as a consultant to numerous organizations.
JOAN WALLACE	B.A., former chairperson, Commission of Inquiry into Part-time Work, Labour Canada. Former member, Canadian Advisory Council on the Status of Women (1973-77). Former director, Canadian Research Institute for the Advancement of Women. Founding President, Vancouver Status of Women. Served on human rights tribunals for the Canadian Human Rights Commission. Writer and consultant.

PAUL FRASER **(Chairman)**	B.A., LL.B., Q.C., is a partner in the Vancouver law firm, Fraser Gifford, and practises civil and criminal litigation. He is a past President of the Canadian Bar Association, and former part-time member of the Law Reform Commission of British Columbia. He is currently a Vice-President of the Commonwealth Lawyers Association.

The Committee appointed Professor Robin Elliot of the Faculty of Law at the University of British Columbia as its Director of Legal Research.

Ms. Robin Jamieson has been Director of Administration and Secretary to the Committee.

2. Research

2.1 Empirical Research

Empirical research was commissioned by the Department of Justice after consultation with the Committee. The following working papers have been prepared for the Department and were available to the Committee:

Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity, N. Boyd, Working Paper #16;

A Report on Prostitution in the Atlantic Provinces, N. Crook, Working Paper #12;

Canadian Newspapers Coverage of Pornography and Prostitution, 1978-83, M. El Komos, Working Paper #5

A Report on Prostitution in Ontario, J. Fleischman, Working Paper #10;

A Report on Prostitution in Québec, R. Gemme, A. Murphy, M. Bourque, M. A. Nemeh, and N. Payment, Working Paper #11;

The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases, M. Haug and M. Cini, Working Paper #7;

Prostitution and Pornography in Selected Countries, C.H.S. Jayewardene, T.J. Juliani and C.K. Talbot, Working Paper #4;

A Survey of Canadian Distributors of Pornographic Material, B. Kaite, Working Paper #17;

Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden, John S. Kiedrowski and Jan, J.M. van Dijk, Working Paper #1;

A Report on Prostitution in the Prairies, M. Laut, Working Paper #9;

Vancouver Field Study of Prostitution, Research Notes, 2 vols., J. Lowman, Working Paper #8;

The Impact of Pornography: an Analysis of Research and Summary of Findings, H.B. McKay and D.J. Dolff, Working Paper #13;

A Content Analysis of Sexually Explicit Videos in British Columbia, T.S. Palys, Working Paper #15;

National Population Study on Pornography and Prostitution, Peat Marwick & Partners, Working Paper #6;

Agreements and Conventions of the United Nations with Respect to Pornography and Prostitution, D. Sansfaçon, Working Paper #3;

Pornography and Prostitution in the United States, D. Sansfaçon, Working Paper #2;

The Development of Law and Public Debate in the United Kingdom in Respect of Pornography and Obscenity, Ian Taylor, Working Paper #14 Department of Justice, Ottawa, 1984.

Particular findings and descriptions from this research are referred to throughout this Report. The Department of Justice proposes to publish the Working Papers following the publication of this Report.

2.2 Legal Research

The Director of Legal Research undertook research in the following areas:

(i) Comparative legislation and jurisprudence in the United States, the United Kingdom, Australia and New Zealand;

(ii) the provisions of the *Criminal Code* and related Canadian jurisprudence;

(iii) the provisions of the *Charter of Rights and Freedoms* as they relate to pornography and prostitution;

(iv) Canadian municipal by-laws and related jurisprudence;

(v) previous proposed Canadian legislation and suggestions for Law Reform;

(vi) review of reports of various Canadian Parliamentary Committees, Law Reform Commission, American, English and Australian Commissions and Committees on obscenity, pornography, film classification and prostitution.

3. The Committee's Approach

Obviously, each of the members of the Committee had formed some views about both pornography and prostitution before their appointment. It could hardly be otherwise. However, each member approached the Committee's task with a determination to regard previously formed views as tentative. We were determined to rethink our individual biases on both subjects.

We hope that our approach has been successful. We mention the approach we took in order to record the importance we all attached to impartially obtaining and treating the views of those individuals and groups who made submissions to us.

The establishment of the Committee was controversial. Some groups and individuals considered that the creation of the Committee was an indication of the government's determination to legislate in an informed way. Others considered that the government of the day had established the Committee as an excuse to avoid needed legislative action. Clearly the Committee did not share this latter view, but we came to understand it. Indeed, we soon learned to appreciate the depth of feeling, urgency and concern held by those who had been living with the realities of pornography and prostitution.

It was necessary for us to acquire more than an abstract understanding of how the law appeared to be working or not working in these areas. It was also necessary for us to appreciate that changing the law was an exercise in dealing with effect and not cause.

The Committee considered that the most important aspect of its work was to ascertain the views of the public, both formally and informally. We had been asked whether there was a consensus among Canadians about what should be done to solve the problems of pornography and prostitution. We decided that we had to know as much as we could about what Canadians thought the problems actually were, if we were going to really understand the range of available solutions.

4. The Public Hearings

In order to do this we decided to hold public hearings across the country. We wanted to hear from those who had not only thought about the problems, but had experienced their social reality. We wanted to attract our critics as well as those who had welcomed the establishment of the Committee.

Before the meetings began, Committee members spent the Fall of 1983 familiarizing themselves with what appeared to be the issues involved in both subjects. We had early contact from the existing groups who had forceful ideas about both subjects, but what was also needed was some general public reaction from individuals, groups and institutions who had not previously expressed themselves on these issues.

In order to describe and publicize the issues as a means of focusing discussion at our public meetings, the Committee decided to publish an *Issues Paper* for circulation to those who were or might be interested in our work. A basic circulation list was established by collecting the names of groups and individuals who had expressed interest. The *Issues Paper* was published and distributed in December, 1983. The first run of 5,000 copies went quickly and eventually a total of 16,200 copies were made and circulated. The level of interest exceeded our expectations.

The public hearings took place from January to June 1984 in 22 centres across Canada. The cities and towns visited by the Committee (in order) are:

Calgary
Edmonton
Vancouver
Toronto
Niagara Falls
London
Windsor
Montréal
Val D'or
Sherbrooke
Québec City
Victoria
Regina
Winnipeg
Ottawa/Hull
St. John's
Charlottetown
Fredericton
Halifax
Thunder Bay
Yellowknife
Whitehorse

Hearings were held in every province and territory of Canada, in large and small cities, border cities and towns in order to obtain the thinking, reaction and suggestions of Canadians living in all parts of the country and in all sizes of communities.

The hearings were advertised in advance and were usually very well attended. Most presenters supplied the Committee with written copies of their briefs, either before the hearings or during them. Recordings of the hearings were made and were available to the Committee in the course of our deliberations.

The hearings were informal and as unstructured as possible. Usually there was time for a number of questions and answers and, where it was important to do so in order to understand the submissions we received, the Committee visited sections and districts of cities and towns.

Appended to this Report is a list of the individuals and groups who made submissions to us in the course of the public hearings. Throughout the Report will be found references from the various briefs.

At the same time as the Committee held public hearings, we met privately with those persons who, for one reason or another, did not want to make a public submission. These private interviews were just as important to our work as the public proceedings. We encountered prostitutes, former prostitutes, performers, parents of young prostitutes, social workers, community workers and many others who shared the benefit of their experience and particular insights.

Altogether, our contact with the Canadian public was highly informative. The briefs and submissions we received often showed evidence of weeks of preparation and work as well as an even longer previous involvement with the issues. We benefitted greatly from the hearing process and we are grateful for the many hours of effort which people devoted to them.

While ascertaining the views of the public was the most important aspect of our research, we did not consider that our mandate was, in effect, to conduct a referendum across the country on the issues of pornography and prostitution. We considered that we were appointed to do more than tabulate differing views.

5. Consultations

The next phase of our work involved superimposing on the views that we had received from the public, those of the administrators, bureaucrats, researchers and others involved day-to-day with the effects and regulation of pornography and prostitution.

We consulted with the Department of Communications, the Law Reform Commission of Canada and the Canadian Human Rights Commission, as well as Canada Customs, Canada Post Corporation, the RCMP, the Canadian Radio-Television Telecommunications Commission, various of the provincial film classification boards, the representatives of the Joint Law Enforcement Project in Ontario concerned with pornography and known as Project "P". Without exception, our consultations were straightforward, informed and informative.

In addition, the Committee met with Drs. Edward Donnerstein and Neil Malamuth, whose experimentation and writing on the subject of pornography have become well known and is referred to frequently in the course of this Report.

The Committee was also privileged to meet with Professor Bernard Williams, the chairman of the Committee on Obscenity and Film Censorship appointed by the Government of the United Kingdom in 1977. Professor Williams' comments and suggestions have been invaluable.

One other aspect of the Committee's work that should be mentioned is the effort to view the material that is said to be pornographic and is currently in circulation in Canada. A number of individuals and groups who appeared at the public hearings brought with them material that was commercially available. We examined this material when it was presented and we also looked at a large variety of material that was referred to in several of the recent cases. We observed the practice of viewing the material in full and not out of context.

In coming to prepare our Report and make recommendations, the Committee imposed upon itself the discipline of preparing draft legislation whenever we recommend legislative change. We concluded at an early stage that any legal changes we might recommend should have the effect of bringing clarity and certainty to the law. It seemed to us that our contribution to law reform would be most useful if we were prepared to show precisely how the law should be changed.

If there has been a benefit to preparing draft legislation, there has also been a risk. No doubt some of it is less than perfect. However, we hope that it will form at least the basis for further discussion and ultimately, for an overdue reform of the law.

What follows in our Report is a document that is in five parts. We first deal with the philosophical considerations that we have applied in approaching both subjects, and discuss the Canadian constitutional landscape. The issues of pornography and prostitution as they affect adults are discussed separately, and are followed by a separate part devoted to both subjects as they particularly affect young persons and children. The report ends with our recommendations.

Section II

Philosophical and Constitutional Considerations

Chapter 2

Philosophical Considerations

1. Introduction

Any attempt by a society to deal with pornography and prostitution must take account of its own philosophical and ethical traditions. A necessary prelude, then, to examining social and legal strategies for dealing with these problems is to analyze the thinking about pornography and prostitution in Canada and other societies which have a similar pattern of social and cultural development. Our discussion will entail a review of three different philosophical traditions, the liberal, the conservative and the feminist.

2. The Liberal View

There is deeply ingrained in the political and philosophical tradition in western societies, the belief that the fundamental value is the freedom of individuals to develop their own view of life, without direction from the state or from the majority. In countries with an Anglo-American legal heritage this view of the world, which penetrates deeply into all aspects of our culture, has its most influential embodiment in the writings of John Stuart Mill.[1] Those who espouse what might be described as the liberal view of the relationship between law and morality, emphasize Mill's dual contention that society benefits from an "open marketplace of ideas" rather than the prescription of majoritarian "wisdom", and that each individual is the best judge of his or her own interests.[2] The necessary corollary of this view of society is that the state is justified in intervening only to punish or control human conduct when it does harm to other people.

> [T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[3]

Apart from children and adults incapable of conducting their own affairs, what people do to themselves or in concert with others, which has no injurious impact on third parties, is the individual's own business, even if it involves the self infliction of either physical or moral harm.[4]

Although Mill himself did not articulate with great certainty or precision the limits of the "harm principle",[5] generations of followers have attempted to give substance to it, not without disagreement. At one end of the spectrum are philosophers who attach such central importance to the notion of individual autonomy that only the narrowest interpretation of the principle is acceptable.[6] At the other are those who postulate a more flexible notion, including those who believe that there is a legitimate principle of "paternalism" which qualifies the harm principle. Under the latter, state intervention may be warranted in a limited range of circumstances to protect individuals from themselves.[7]

Mainstream liberal thought seems to be agreed that harm does embrace both physical harm to others, and the sort of psychic harm involved in people being involuntarily subjected to offensive or objectionable conduct or representations of it.[8] It clearly does not extend to mere feelings of moral distaste that such conduct or depictions of it exist and are being enjoyed by others. Also central to the liberal view of harm is the idea that it is the immediate cause of it which is culpable, not the more remote causes. Thus, for example, it is legitimate to proscribe driving while under the influence of drink because it has been proven to cause accidents. It is not, however, legitimate to proscribe drinking for that reason.

The practical ramifications of these views for lawmaking in the areas of both pornography and prostitution are clear. In the case of prostitution, it would follow that the law has no legitimate function in prohibiting anyone from choosing or practising that lifestyle, or in penalizing adults who, by consent, engage in sexual activity for money, as long as no physical harm is caused or threatened to either participant, and neither physical harm nor psychic offence done to others. The law may legitimately interfere with those who forcibly coerce others, even adults, to become and remain prostitutes, and who exploit them against their wishes.[9] It may also be invoked to penalize or control the nuisance caused to other people by prostitution.[10]

With pornography, it would be argued that the law has no acceptable role in preventing the production, distribution, sale or possession of pornographic material, unless some recognized harm can be attributed to it. It is legitimate for the law to intrude to prevent physical harm being done or even threatened to those who participate in pornographic productions.[11] Moreover, the law may be used to ensure that pornographic materials are not marketed in such a way that they cause involuntary offence to members of the public.[12] The law has no role in curbing the sort of alleged "harms to society" foreseen by those of a conservative philosophical view, for example, the moral disintegration of society, unless it can be demonstrated clearly that there is a direct link between the consumption of pornography and physical harm or threat of it to individuals. Such a causal relationship must rest upon empirical study and statistical probability, not upon supposition or anecdote, even though these may claim to reflect common sense.[13]

3. The Conservative View

Although the liberal view on the legal proscription and control of these phenomena is dominant in philosophical writing and jurisprudence in western countries, it is by no means the exclusive view. Modern liberal theory on the relationship of law and morality grew out of a need to answer the more traditional conservative position that there is a necessary coincidence between law and the moral values of the community.

This conservative view has two variants. The first states that societies are not simply collections of individuals, but organic units with shared ideas and institutions. The shared moral values of societies are rooted in their cultures, have stood the test of time, and embody the sober wisdom of the majority.[14] Their embodiment in the law is preferable to the easy or uncertain morality of pluralism, which ignores the reality that individual actions, even if directed towards the actor alone, have an impact on the "moral environment" of the community.[15] The second, generally associated with the views of the distinguished British jurist Lord Devlin,[16] adopts the more pessimistic view that, unless the law embodies and enforces traditional moral values, society will lose its "moral cement" and gradually disintegrate. The cohesive power of shared morality is essential to society's welfare, and requires the support of the law.[17]

Both these strains of thinking allow in theory for significant intervention by the law to proscribe immoral conduct, even where it is freely chosen by the individual or individuals concerned, conducted in private and of no direct harm to anyone else.[18] They posit that the state has a right to step in and prevent personal immorality where it clearly offends the sense of propriety and decency of the majority of the community. Moreover, the criminal law, apart from its other functions, has an important symbolic role to play in stating what the common morality will not tolerate. In fact, however, some of the advocates of the "moral environment" and "moral cohesion" approaches admit that these values have to be balanced against others such as liberty and privacy. Furthermore, they accept some pragmatic reservations to these principles, such as those which stem from difficulty of enforcement.[19]

The translation of conservative theory into practice on pornography and prostitution reflects to some extent the tensions mentioned in the last paragraph. The act of prostitution, although detrimental to the dominant and shared morality, is normally considered by conservatives to be less serious than other forms of sexually deviant conduct. This, together with obvious difficulties in enforcement, has persuaded them that adult female prostitution will remain beyond the reach of the law. There is less certainty with respect to homosexual prostitution, because some conservatives see it as possessing the additional characteristic of "unnaturalness" which makes it particularly repellent to the community's sense of morality. The deviance here is extreme enough that it may well outweigh other considerations.[20]

There is also strong condemnation of those who exploit prostitutes for personal profit or commercial gain. Here, conservatives often introduce the idea of someone being a social parasite. Those who do not earn their own living and, in addition, live on earnings gained through immoral activities, are particularly reprehensible. Finally, the conservative view results in strong legal proscriptions against the public conduct of the trade, for example, street soliciting. Such action is justified on the ground that prostitution offends the common moral values and, therefore, ordinary citizens should not have to contend with this affront to their sensibilities as they move about their communities.[21]

The conservative approach to the law and prostitution is not an unambiguous one, but represents to varying degrees an accommodation between principles and what is practical in the twentieth century. The approach to pornography, however, is much more uniform and consistent.

Whatever its character, the fact that pornography is produced to stimulate sexual feelings or fantasy is subversive of the moral values of the community. Thus the intent of the material, rather than any empirical association with harm to an individual, is the measure of its illegality.[22] As some conservatives have a limited view of what is acceptable sexual conduct, the ambit of legislation to control pornography is predictably wide, with the consequence that representations which others would see as permissible eroticism, may be considered as indecent or immoral in the conservative's mind.[23] In particular, the conservative is concerned to preserve the sanctity of the family and the view that sexual relations should take place only within the context of marriage. Any activity which might be seen to encourage sexual activity outside of this context is thus to be strongly discouraged.

4. The Feminist View

Traditionally, conflict on moral issues in western societies has centered on the opposition of liberal and conservative thought. In recent years, feminist thinkers and writers have begun to challenge the assumptions of both, and to give their own interpretations to the relationship between law and morality. It must be said at the outset that feminism is not itself a discrete philosophy. It is, rather, a broad coalition of interests dedicated to the common purpose of improving the status of women in society. As with other coalitions designed to achieve a practical outcome, it embraces a wide range of philosophical convictions.

The common objective of achieving true social equality itself influences and modifies the underlying philosophical positions of these feminist writers. They attempt to reconcile the traditional philosophical positions of western societies, which they have learned and often accepted, with their goal of achieving equality for women and thereby changing in a fundamental way the attitudes and structure of society. As a result, we are beginning to see feminist critiques of contemporary society which draw upon various philosophical traditions, and at the same time attempt to inform and infuse those traditions with a sense of the struggle of women for real, rather than merely formal, equality. The resulting literature represents an important and challenging contribution to our understanding of the two social phenomena under examination, and forces us to ask whether orthodox philosophical positions really have that property of innate wisdom which is claimed for them.

In the view of feminist thinkers, our society is built around a sexual class system, which frustrates the legitimate aspirations of half the population for economic, social and sexual freedom.[24] Pornography is seen as especially odious because it reinforces that system by instilling and perpetuating notions about women's inferiority and limited role within society. It sets women apart as different and characterizes them as the legitimate objects of not only male sexual pleasure, but male frustration and violence.

With prostitution, the sexual class system operates in a more limited but nevertheless vicious manner, in that it sets aside a small and disadvantaged group of women to satisfy the sexual needs of men who cannot find the satisfaction they want elsewhere.[25] Both pornography and prostitution are predicated on the assumption of men's power over women. Men are seeking depersonalized sexual relations which call for no commitment on their part, whether this is achieved through buying the services of a prostitute or pornographic representations.

Differences exist between feminist writers as to the strategies to be adopted to combat these manifestations of sexism. Those who have a Marxist orientation incline to the view that the answer to sexism lies in the removal of the capitalist values and structures which make it possible.[26]

A second and larger group sees women's problems as those of gender discrimination rather than of classical economic exploitation and takes a somewhat different view. They assume the continuation of liberal democracy, and relate their critique of sexism to that politico-legal context. Some writers in this group see little value in the use of legal expedients to reform society, believing that education and other socialization processes are likely to be much more successful in the long run.[27]

The majority, however, favour the vigorous use of legal, as well as political and social strategies, to combat and eliminate sexism. Reorientation in the legal system requires, first of all, a change of focus in the substantive law. In prostitution this means decriminalization of the activities of prostitutes.[28] In the case of pornography, what is required is a new emphasis on proscribing the violence and degradation of women and children which it contains.[29] At the level of structures and process, steps have to be taken to make it easier for women to use the legal system to challenge the product of the pornographer, and to seek protection for themselves and their children.[30] Although many of these women are strong civil libertarians by conviction, they see orthodox liberal thinkers as blinkered and conscious only of the rights of their exploiters and detractors. If the rights issue is to be debated seriously, they say, then their rights to equality, freedom from personal abuse or threat, and to dignity are entitled to consideration and protection.[31]

It is the feminist position on the rights question which provides a significant challenge to orthodox liberal theorists. According to feminists, the liberal tends to characterize the rights issue in terms of the infringement by the state on the rights of an individual. Little or no attention is paid to the fact that rights issues often develop out of what is, at base, a conflict in the exercise of rights by two individuals. True, the immediate agent of one side may be the state, but that does not alter the fact that a clash of rights between individuals is involved.[32]

If this is correct, then the legal system is not only called upon to protect rights, but also to choose which right is entitled to greater protection. This is unlikely to give the liberal any trouble when it is clear that the exercise of a right by one has caused harm to the other in the exercise of those rights. Much less clear is the liberal reaction when the opposing right has not, in fact, been abridged in the concrete sense but only in the abstract, for example, when a woman claims a pornographic publication infringes her right to equality in that it treats women as degraded or subhuman. Here, the liberal would argue that in the absence of a tangible interference with the "victim's" right, there is no warrant for curtailing the offending activity.

The feminist response to this line of argument is that it demonstrates the bankruptcy of the narrow characterization of the harm principle, and points to the need to redefine the notion of rights in liberal theory.[33] As long as rights in the liberal glossary mean liberty in the sense of being free to act without restraint, they have little value in a society in which fundamental inequalities exist. Thus for women, the fact that on the formal level they enjoy the liberty to do certain things is of little consequence if the social environment prevents the exercise of those rights, and there is no correlative duty on the part of others to see that the rights are exercisable.[34] The distinction is one between "privilege" or "liberty" rights, which merely raise an obligation on others not to infringe, on one hand, and on the other, "claim" rights which generate positive responsibility to see that the claimant is enabled to exercise her rights.[35]

Using this extended notion of rights and tying it to the unequal position of women in society, the feminist argues that greater freedom and equality for women entails some loss of liberty and status for men:

> Equality cannot flourish without limiting the privileges some already have in both the private and public spheres, because the inequalities of the present system were a product of the unequal attribution of rights in the first instance; thus greater equality and liberty for those least advantaged under the present system necessitates placing restrictions on the privilege rights of those who are presently most advantaged. And since this must be done by creating obligations either to do or forbear actions previously permitted, it can be accomplished only at the expense of negative liberty.[36]

The point is also made that this view is not revolutionary. The empowerment of disadvantaged groups in society has typically been achieved by this sort of social engineering.[37]

Feminist writers also join issue with the liberals on the interpretation of the "harm" requirement. As the discussion of the liberal view has demonstrated, the philosophical liberal has a limited perception of harm as a basis for invoking legal proscription or restraint. Either measurable harm, for example, economic, physical or mental to an individual, or statistically verifiable general harm must be established.

Feminists react in two ways to this approach. The first is to challenge the assertion that the "harm" principle is necessarily so limited. Given their perception that sexism in our society is endemic, and their belief that eradication of it requires recognition of the special claims of women, they construct a broader notion of harm which includes a social harm, and in particular, the adverse and potentially divisive effects of a significant segment of the male community developing or reinforcing a thoroughly misogynistic attitude.

Secondly, they will argue that, even if a narrower view of harm is adopted, there is enough data to demonstrate that women are victimized by the sexism inherent in pornography and prostitution.[38] They point to an increasing body of research by social psychologists which, it is claimed, suggests a link between pornography and violence against both women and children. The existence of this link is, they argue, supported by a growing number of reported cases in which battered women report that pornography influenced the conduct of their partners. Finally, they claim, common sense would suggest that frequent exposure to this type of material is likely to have an adverse and brutalizing effect on male perceptions of women as well as male sexuality.

In the same way that feminist writers have difficulty with liberal theory, so they reject acceptance of conservative ideas. On the surface, feminist and conservative theory seem to coincide in that they see "harm" as embracing harm to the community or to society in general. Moreover, insofar as feminist theory views the sexual exploitation of women as subversive of society, it has some similarities to the disintegration theory of Devlin. However, feminist writers are quick to point out that similarities are superficial. They see conservative theory as oppressive and unsatisfactory, because its fundamental assumption is that the ideal society is one in which women have a subordinate and submissive role, and in which sexual expression of all but the most orthodox type is frowned upon.[39]

Feminists view themselves not as opponents of sexual freedom (they see it as essential to female liberation), but of a form of male sexual licence which prevents the full expression of female sexuality, and threatens the physical and psychic welfare of women. Their fear of embracing conservative theory is that it would mean inviting a repressive, institutionalized sexual regime. Furthermore, they note with concern that some conservatives fail to distinguish erotica from pornography, because of their inability to break out of the paternalistic and stifling sexuality of the past.[40]

It will be apparent from our discussion of philosophical considerations that we have given only a broad overview of what are, in fact, very complex debates.

We have not included the many different versions of liberal, conservative and feminist thought, nor have we made specific reference to what could be termed a socialist viewpoint. Rather, our discussion is intended to present the essential arguments in each of the three approaches, since these are the foundations on which the presentations we heard at the public hearings were based. In addition, these philosophical traditions are at the root of the principles which we believe must inform any attempt to reform our legal and social responses to pornography and prostitution.

5. The Role of the Criminal Law

Each of the philosophical positions discussed above is reflected in attitudes towards the criminal law and its role in society. A wide range of views were put to us during the hearings as to the appropriate role of criminal law in dealing with both pornography and prostitution. These ranged from the extreme conservative position that there should be a complete identification of the criminal law of the state with the "moral law", to the extreme libertarian view that the criminal law should intrude only when physical harm had been caused by one person to another.

It is our view that the role of the criminal law lies mid-way between these extremes. The view that criminal law is somehow the solvent of all social ills is, we believe, naive. History has shown that the enactment of draconian laws has typically had a marginal impact on behaviour patterns. With the possible exception of communities in which there has been a complete identification of church and state, a highly retributive body of law and rigid enforcement, the effectiveness of harsh criminal law has been more apparent than real. The reality has, in fact, been uneven and capricious enforcement, and mitigation of its harshness by those charged with applying the law, whether judges or juries.

We appreciate fully that law, especially criminal law, has an important and often invisible impact in moulding and influencing peoples' behaviour, and it is clear that some criminal law provisions affect behaviour beneficially without the instrumentation of enforcement. It is important however, that we recognize that "law-abidingness" may be attributed to a range of factors other than the fact and severity of the criminal law. Moreover, there are situations, some of them in the interface between the criminal law and morality, where the criminal law is so patently ineffective that no redeeming purpose can be ascribed to it.

We also disagree with the view that the criminal law should be confined to the tangible harm caused by one individual to another. Although we think that there should be less rather than more intrusion of the criminal law into the lives of citizens, we also think that it has a wider, legitimate ambit than is often claimed for it. Criminal law is, in part, a reflection of the values of society. We penalize culpable homicide not only because it involves a "harm" by one to another, but also because we consider it undesirable for the welfare of society that people should kill each other. This latter view reflects both the pragmatic concern that violence is disruptive of the life of a community, and the moral sense that it is bad.

In short, criminal law has something to say about both the values of society and the need to protect them by a system of proscriptions and punishments. In this, we agree with the position taken by the Law Reform Commission of Canada in its working paper on "The Limits of Criminal Laws", and the publication of the federal Department of Justice, *The Criminal Law in Canadian Society*. In the former the Commission observed:

> ... The criminal law serves partly to protect against harm but more importantly to support and bolster social values. Protection against harm it seeks to achieve through deterrence, rehabilitation and - most successfully - prevention. Support of social values it manages through "morality play" technique - by reassuring, by educating and above all by furnishing a necessary response when values are threatened or infringed. And this on the face of it suggests using criminal law only against conduct causing harm or threatening values.[41]

In the Department of Justice study the statement was made:

> The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.[42]

To what degree social values and their protection or furtherance should be the concern of the criminal law is a question on which there will be widely differing viewpoints. That in part is why the question of the role of the criminal law in relation to both pornography and prostitution is so highly charged. There are dangers in criminal law being used in inappropriate ways to solve problems which may be more susceptible to other legal strategies or to non-legal social regimes. Thus we are strongly of the view that great care has to be taken to establish what are the social values that need to be reinforced and protected, and to demonstrate the propriety and efficacy of using the criminal law for these purposes.

6. Essential Principles

We have received briefs representing each of the several points of view elaborated upon in the foregoing sections. Each has, of course, urged that the Committee espouse the proponent's particular view, be it the liberal, the feminist, or the conservative. We do not, in this Report, adopt in its entirety any one perspective or theory of society or of pornography and prostitution.

It is undeniable, however, that certain basic principles have informed our thinking on these issues. They have influenced the way we have formulated our recommendations, and may well have had a bearing on how we as a Committee have synthesized the public's views and found or interpreted areas of consensus.

We want to make our premises explicit, so that readers of this Report may more fully appreciate its perspective, and the pattern for public policy which we have tried to develop. We feel confident, as a result of the deliberative phase of our Committee's work, that the principles set out below reflect some reasonable degree of social consensus, and that these principles should inform the approach of the legislator to pornography and prostitution.

Here, then, are the essential principles upon which we have sought to craft our proposals.

6.1 Equality

We are fully persuaded that any legal regime of dealing with pornography and prostitution must be founded upon the rights of women and men to legal, social and economic equality. We agree with the argument that the phenomena of pornography and prostitution are at least reflections (if not causes) of perceptions that women are inferior, and that men can expect women to be available to service their sexual needs. We know that many individual men do not share these perceptions. It is, however, clear that the maintenance of these attitudes towards women over the centuries has played a significant role in the historical allocation to women of subordinate roles in the social, political and economic order.

Much progress has been made toward achieving legal equality for women in Canadian society, and work continues on the discrepancies in the economic and political opportunities available to women. Yet we find convincing the arguments of those, feminists and non-feminists, who argue that the role assigned to women in pornography and in prostitution reflects the sort of social attitude that is inhibiting improvement of the status of women.

We believe that Canada should be ready, collectively, to reject the view of women which is embodied in much contemporary pornography, and in the conception of what can be expected from a prostitute. The proposals which this Committee makes for legislation, education and social programs are designed to carry forward the egalitarian impulse which we have perceived during the public hearings, and to confirm that it is not merely an impulse but also a commitment.

We recognize that the issue of equality also arises in the context of young persons. They are, in many important respects, fully the equals of adults: they deserve the same respect as human beings, regard for individual differences, and concern for human dignity that we, as adults, expect for ourselves. In our view, social policy should proceed on the basis of a firm recognition of the child's right to equality in these important areas.

However, we do not think that the child can be treated as the full legal equal of the adult, for purposes of fashioning the criminal law. Liberal thought has long recognized the particular vulnerability of the young: they are, depending on their age and development, less able to care for themselves and protect their own interests. Society must accept a greater measure of responsibility for their welfare, and young persons may, in turn, expect some corresponding curtailment of their capacity to act as free agents. This observation leads to the second principle which we believe important to take into account in formulating policy.

6.2 Responsibility

We are of the view that as a general rule, the adult must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as victims, whether of the economy or patriarchal social structure, or of abuse directed at them during their early years. We have sympathy with this point of view, and do not think that it would be out of place as a consideration in sentencing the individual case. However, we do not accept it as a principle upon which to structure the criminal law.

In contrast, it is our view that children should be regarded as vulnerable, and in need of society's protection, when dealing with the issues of pornography and prostitution. Children would thus be seen as victims or potential victims of people engaged, or wanting to engage, in these activities.

There is one exception to this basic approach. We have reviewed the issue of what age should be considered the upper age limit for childhood, and recommend that for legislation relating to pornography and prostitution, we adopt uniformly the age of 18 found in the *Young Offenders Act*. From this follows the real possibility that young persons of 16 and 17 (or perhaps younger) may be involved in taking advantage of still younger children, by introducing them to prostitution, to performing in pornographic displays for filming, and so on. Such exploitation might be of the older child's own motion, or it might be engineered by adults who perceive the advantage in having as fronts those who are free from serious criminal responsibility. Accordingly, we think that it would be wise to except from the general principle of the child as victim, those activities where people under 18 exploit others under 18. In such cases, the exploiter should be made to accept responsibility for his or her actions.

6.3 Individual Liberty

The basic idea that adults are responsible for their conduct carries with it the corollary that the law should permit them a zone free from regulation, in which they are responsible only to themselves. An important aspect of this personal liberty is, in our view, freedom of expression. The rights to speak, to think, and to create are essential to the preservation of our society, and deserving of a high degree of protection from state interference.

However, where the behaviour of an adult begins to impinge on the lives or conduct of others in unacceptable ways, there is a place for the state. We see the zone of no regulation as that where the adult's conduct does not coerce others, and where it does not impinge unacceptably on the values which are basic to our society. Equality has already been signalled as a basic principle, and we note that in the area of pornography at least, the right of some to equality will sometimes run directly counter to the right of others to create and to enjoy the creations of others. Balancing these two important values has been for us, and will be for society, a difficult yet essential task.

Other values which could readily be seen as conflicting with the principle of individual liberty are human dignity and voluntary sexual expression. So concerned are we that human dignity and voluntary sexual expression be protected in the legal regime that we include these two values with those we consider basic to our recommendations.

6.4 Human Dignity

It was striking to observe how often during the course of the public hearings people would affirm their view that human beings are special, caring and possessed of a basic worth and dignity which they believed was being seriously interfered with by pornography, and the treatment of prostitutes in our society. The public hearings brought to the fore many calls for a regime of regulation which fosters, not destroys, human dignity. In our view, an important part of human dignity is basic physical integrity (which can also, of course, be viewed as an aspect of individual liberty). Activities which threaten the physical well-being of others can find no real place in a civilized society.

6.5 Appreciation of Sexuality

We think that it is essential to accept as a point of departure for policy-making, the idea that human beings enjoy and benefit from open and caring sexual relationships, characterized by mutuality and respect. This principle extends to those under 18 as well, for the child is, in our view, a sexual being. There was little support in the public hearings for repression of sexuality as a means of eliminating what people found offensive about pornography and prostitution. Rather, the submissions which addressed this issue stressed quite the opposite theme. It was pointed out, for example, that young people often turn to pornography, soft or hard core, in the search for information about their developing sexuality, because good sex education courses and healthy erotic literature, are unavailable to them. We often heard that one of the harms of pornography was the insult offered in such material to the joy and satisfaction of non-exploitative sexual relationships. We were cautioned against developing a regime so strict that it would hamper the human need for sexual expression, whether in art, or particularly in the case of young people, in relations between consenting peers.

We believe that all of these concerns have real merit.

7. Conclusion

In the ensuing chapters, we propose in detail changes to the *Criminal Code*, other statutes and social programs in order to deal with pornography and prostitution. The rationale for these recommendations and their relationship to the principles outlined above will be elaborated upon. Here, however, let us simply sketch a few of the major implications of these principles.

With respect to pornography, the emphasis on equality will, we believe, require a shift from the traditional focus on sexual immorality as a basis of criminal prohibitions against pornography. We believe that the development of theory which views pornography as an assault on human rights, will have to be integrated into the conceptual framework of the criminal law on pornography. Our recommendations thus include a complete reworking of the *Criminal Code* prohibitions in this area, to create offences based not on concepts of sexual immorality but rather on the offences to equality, dignity and physical integrity which we believe are involved in pornography. The concern for the vulnerability of young persons has prompted us to devise a number of prohibitions against the use of young persons in sexually explicit material, against the sale, distribution or possession of such material, and the accessibility of such material to young people.

In each case, we have striven for specificity and clarity in the legislative description of prohibited conduct. Similarly, we have attempted to be reasonably sparing in our use of the criminal sanction. Both of these strategies stem from the desire to leave to responsible adults as much freedom of choice and as much capacity to govern their own conduct as is consistent with protection of basic values. They arise also from our hope that the criminal law will, if properly fashioned, interfere with freedom of expression only to the degree necessary to safeguard the other basic values.

With respect to prostitution, our recommendations feature withdrawal of sanctions against simple soliciting: only when the conduct causes actual adverse effect on neighbours and environment is it criminalized. The adult prostitute is accorded by our proposed regime, some leeway to conduct his or her business in privacy and dignity. We would permit one or two prostitutes to receive customers in their own home, hoping thereby to provide people with a safe alternative to the street and parked cars. In addition, we are recommending that the possibility of allowing small prostitution establishments in non-residential areas be discussed by the federal government and the provinces and territories.

Allowing prostitutes to work from their homes would also provide a less exploitative alternative to hotels, motels and other premises which they now have to rent on a temporary basis. We acknowledge that allowing full play to the concept of the responsibility and dignity of the adult prostitute may well require active consideration of treating prostitution exactly like any other business. There is, indeed, an argument that this course is the only way of ensuring that the sexual and other subordination of women who are prostitutes, will come to an end.

The idea that adults who engage in prostitution can and should be counted upon to take responsibility for themselves has led us to recommend cutting back the criminal prohibitions against procuring and living on the avails of prostitution. Only procuring which is effected by coercion or threats will be criminalized in the case of an adult. So, too, we stipulate that receiving financial support from an adult prostitute should be criminal only when that support is exacted by means of coercion or threats.

Where young persons are concerned, the emphasis of our recommendations is to provide strong protection against exploitation. Procuring children to engage in sexual activity for reward is made criminal even where no threats are used. So, too, is receiving support from the paid sexual activities of young persons. We have recommended adding to the *Criminal Code* a specific prohibition against engaging, or offering or attempting to engage, in sexual activity with a young person. However, we do not recommend criminalizing the behaviour of young persons, except to the extent that they come within the general prohibitions because of their own exploitation of other young persons.

The full dimensions of our recommendations will be explored in detail. One further point about the implications of the basic principles should be noted here. The full working out of these principles will in some cases require considerable social adjustment. In particular, the equality principle, even if accepted at the theoretical level, will still need for its full implementation, substantial reallocation of economic and social resources. There remains, too, a formidable task in re-education and reshaping of attitudes in certain sectors of society. These long range tasks cannot be accomplished by means of legislation. They require social will and commitment. We cannot delay legislation, however, until this process has been completed.

Footnotes

[1] John Stuart Mill *On Liberty* 1859. ed. E. Rapport, (Indianapolis: Hackett Publishing Co., 1978). So deep seated is this view that it is accepted by many socialists and social democrats.

[2] The tendency in contemporary liberal thinking is to emphasize the importance of freedom of expression for the autonomous development of the individual. See the *Report of the Committee on Obscenity and Film Censorship*, Cambridge: Cambridge University Press, 1981 (the Williams Committee Report), at 53-7.

[3] Mill, *On Liberty*, at 9.

[4] *Ibid.*, at 9-10.

[5] The uncertainty of its ambit in Mill's mind is revealed in the last chapter of his essay, *ibid.*, at 93-113.

[6] See Robert Nozick, *Anarchy, State and Utopia*, 1981, Rowman and Littlefield.

[7] H.L.A. Hart, *Law, Liberty and Morality*, (London: Oxford University Press, 1963), at 30-4.

[8] See Joel Feinberg, "Pornography and the Criminal Law". In D. Copp and S. Wendell eds., *Pornography and Censorship*, (Buffalo: Prometheus Books, 1983), at 105.

[9] Canadian Advisory Council on the Status of Women, *Prostitution in Canada*, Ottawa, 1984.

[10] Williams, note 2, at 131-3.

[11] *Ibid.*, at 112-4.

[12] *Ibid.*, at 132.

[13] *Ibid.*, at 123.

[14] See *Brodie* v. *R.*, [1961] B.R. 610 (Que. C.A.) per Casey J.

[15] For discussion of variants of the "conservative view", see W. Barnett, "Corruption of Morals - the Underlying Issue of the Pornography Commission Report", (1971) *Law and Social Order* 189, at 201-5.

[16] As expounded in particular in Patrick Devlin, *The Enforcement of Morals*, London: Oxford University Press, 1965.

[17] *Ibid.*, at 12-14.

[18] *Ibid.*, at 12-18.

[19] *Ibid.*, at 16-25.

[20] Lord Devlin took the view that it was certainly legitimate to ask whether homosexuality is so abominable 'that its mere presence is an offence' (ibid., at 17). Others have answered that question in the affirmative.

[21] The liberal would not necessarily demur from legal restraint here, but would justify it on the ground of "harm" in the sense of public offence.

[22] See the critique of Fred Berger, "Pornography, Sex and Censorship" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 83-104.

[23] *Ibid.*, at 89-9.

[24] L. Clark, "Liberalism and Pornography" in D. Copp and S. Wendell eds., *Pornography and Censorship* at 53-7.

[25] K. Barry, *Female Sexual Slavery*, (New York: Avon Books, 1979).

[26] See Charnie Guettel, *Marxism and Feminism*, (Toronto: The Women's Press, 1974).

[27] See for example Beatrice Faust, *Women, Sex and Pornography*, (Harmondsworth: Penguin Books, 1980, 180-9).

[28] See Barry, *Female sexual slavery*. Not all feminists agree on the implications of decriminalization, with a majority favouring strict legal enforcement against male exploiters and educational and social programs to educate against prostitution, and a minority favouring treating adult prostitutes as individuals running a business, subject to normal legal rights and obligations which go with that.

[29] See Diana E.H. Russell, "Pornography and the Women's Liberation Movement" in Laura Lederer ed. *Take Back the Night:* Women on Pornography, New York: Bantam Books 1980, at 301-6.

[30] This has led some feminists to look at human rights mechanisms as the most productive route, because they are more sensitive to exploitation concerns.

[31] Much of the most vigorous writing on the theme has been from the United States. See Lederer, *Take Back the Night: Women on Pornography*, at 237-58. See also "Colloquium: Violent Pornography: Degradation of Women versus Right of Free Speech" (1978), 8 N.Y.U. *Rev. Law and Soc. Change* at 181 *et seq.*

[32] Although Mill recognized this, there is little in *On Liberty* which addresses the problem of balancing conflicting rights.

[33] Clark, "Liberalism and Pornography", at 45-59.

[34] Clark entertains doubt as to whether liberalism is adequate to the challenge of changing its conception of rights, *ibid.*, at 57-8.

[35] *Ibid.*, 45-47. The right analysis is adopted by Clark from Isiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty*, 1969, London, at 118-172.

[36] Clark, "Liberalism and Pornography".

[37] *Ibid.*, at 48.

[38] *Ibid.*, at 54-7.

[39] K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique", paper presented to Law and Justice Beyond 1984 conference, Canada Institute for Administration of Justice, Ottawa, October, 1984 at 20.

[40] *Ibid.*

[41] Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*. Ottawa, 1977.

[42] Department of Justice, *Criminal Law in Canadian Society*, Ottawa, 1982.

Chapter 3

The Impact of the Charter of Rights and Freedoms and the Constitutional Division of Powers

1. Introduction

The development of recommendations on criminal and regulatory law in Canada must necessarily take place within the context of constitutional law and practice. In particular the recommendations must be sensitive to two elements in the Canadian constitutional system: (a) the existence of the *Charter of Rights and Freedoms* which represents the first attempt in Canada to enshrine a legal statement of basic rights and values in a fundamental constitutional document (a document which unlike ordinary statutory law is not subject solely to the sovereignty of Parliament); and (b) the division of powers established between the federal Parliament and the provincial legislatures within the structure of Canadian federalism by the *Constitution Act* (formerly the *British North America Act).*

The *Charter* is a very recent document which means that many of its practical implications have yet to be determined. Accordingly, any account of its operation in general and in particular contexts must be to some extent tentative and speculative. The division of powers within the Canadian Constitution is an issue which has exercised the courts since Confederation in 1867. There is accordingly a large body of case law on it, although changing and sometimes conflicting views on where the balance between federal and provincial power should lie, results in uncertainty in some areas. However, guidance is easier to find on the *Constitution Act* than it is on the *Charter*.

2. Canadian Charter of Rights and Freedoms

Guarantee of Rights and Freedoms

1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physicial disability.

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

The Charter of Rights and Freedoms is very much a creature of the late twentieth century. Although section 2 of the *Charter* contains the traditional rights and freedoms which are recognized in all classical written constitutions (the "fundamental freedoms": freedom of conscience and religion, of thought, belief, opinion and expression, of peaceful assembly and association) the *Charter* also reflects the more instrumental vision of the modern liberal state.

Thus it contains rights which represent, to one degree or another, the conscious desire of the Canadian polity to correct social injustices and inequalities. Section 15 recognizes both the equality of every individual "before and under the law", and to "equal protection and equal benefit of the law" without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. It also recognizes the need to exempt affirmative action programs designed to assist people who are disadvantaged by those attributes.

Certain groups whose rights and freedoms were considered to be in need of emphasis are specifically referred to in the document. Under section 28, for example, the rights and freedoms in it are "guaranteed equally to male and female persons", and section 23 provides protection to minority linguistic groups in education. Certain economic rights are also recognized, in particular the right of citizens to move and gain a livelihood anywhere within the country, which is secured by section 6(2).

Finally, the *Charter* recognizes a series of legal rights, which include not only the general statement that "everyone has the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice", but also a series of more specific rights to protection by and within the criminal law process.[1]

The *Charter* recognizes a diverse range of rights. However, it also embodies the notion that rights are not absolute, but need to be balanced in some contexts against the greater claims of the community. Thus in section 1 the rights and freedoms set out in the *Charter* are guaranteed, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Moreover, as a result of political compromise during the constitutional negotiations leading to adoption of the *Charter*, section 33 was included giving Parliament and Provincial legislatures the power to override the fundamental freedoms in section 2, the legal rights set out in sections 7 to 14, and the equality rights in section 15. Accordingly, it is open to the Canadian government, or a particular provincial government, to abridge the rights included, if political or social conditions are considered to warrant such a step. This is subject to a requirement of express declaration of purpose.

By virtue of section 32, the *Charter* applies to the Parliament and government of Canada, and the legislatures and governments of the provinces. Constitutional opinion is divided over whether it governs the activities of private organizations, corporations or individuals.[2]

Although we are still in the early days of interpretation of the *Charter* by the courts, it does seem that a more or less standard pattern of analysis is emerging, at least at the appellate level. As one would expect given the terms of the *Charter*, the issue in *Charter* litigation will typically centre upon a claim that an individual's rights have been infringed by some form of state action, and a claim by the state, that the "infringement" is justified under section 1. Experience so far suggests that the courts first will require the plaintiff to establish a *prima facie* infringement of right or rights, and then require the state to demonstrate that the infringement can be justified under the first section. If the plaintiff succeeds at both stages the legislation in question will be held, to the extent of its inconsistency with the *Charter*, "of no force or effect".

The record of the courts to date suggests that there is some ambivalence in addressing the issue of infringement, in particular the scope to be given to the right or rights involved. Thus, in cases involving claims of infringement of freedom of expression, some courts have tended to include all forms of "expression" as falling within the right in section 2, leaving it to the state to argue why the particular form of expression needs to be prohibited or limited.[3] Other courts, however, have given freedom of expression limited scope, for example, excluding commercial expression.[4]

The Courts have been less consistent in dealing with the issue of justification of the infringement. However, it seems that the basic questions are clear: (a) Is the infringement reasonable, in the sense that it "can be demonstrably justified in a free and democratic society"? and (b) Is it "prescribed by-law"? On question (b) the European Court of Justice has interpreted the European Convention on Human Rights and Fundamental Freedoms, from which the term "prescribed by-law" in the *Charter* was borrowed, to emphasize the need for accessibility by the citizen to the particular law and the use of precise language so that the law is comprehensible to the citizen as a basis for regulating his conduct.[5] The need for accessibility mentioned in that case has already struck a responsive chord with one Canadian appeal court.[6]

In addressing question (a) the courts are engaged in the function of balancing the right or freedom in question, and the purposes underlying the infringement. To assist in this process there is reason to believe that the courts will divide the legitimacy of the infringement question into a series of sub-issues related to: (i) the nature of the purposes for the infringement; (ii) the legitimacy of those purposes; (iii) whether and to what extent they are furthered by the legislation; (iv) the importance of those purposes; (v) the seriousness of the infringement; (vi) the availability of less drastic means; and (vii) whether the infringement is, in the circumstances, too high a price for the community to pay.

In addressing issue (i) it has been suggested that the courts will restrict the government to raising the purposes stated at the time of enactment of the legislation, ignoring rationalizations after the fact.[7] As to issue (ii), legitimacy will probably not be difficult for the government to establish, as long as the evident purpose of the legislation or action is not to attack the very purpose of the right or freedom in question. Under issue (iii) the courts should be able to ensure that the government is not deflecting attention from the true and unstated purposes of the legislation, or using legislation for legitimate purposes which only advances those purposes minimally.

Issue (iv) provides the courts with an opportunity to distinguish and rank the stated purposes of government action. It is likely, for example, that legislation which enhances or protects constitutional values or those inherent in our general law will draw greater support than that which embodies novel or seemingly repressive principles. The courts will also be enabled by issue (v) to make qualitative distinctions, this time on the basis of the seriousness of the infringement. For example in relation to a case involving an infringement of equality rights the court would be concerned with the characteristics of the group allegedly affected by the legislation, (e.g. age, race, sex, etc.) and of the interests at stake. Canadian courts have already indicated that they are ready to distinguish serious and minor infringements.[8] In litigation under section 15 (the equality section) it is not fanciful to expect that the courts will be far more protective of the rights of groups and attributes which are typically the target of discriminating conduct and attitudes, i.e. those specifically mentioned in the section rather than of those which are associated with anti-social or exploitative behaviour of the type which would be associated, for example, with procurers and pimps.

Under issue (vi) the courts will be able to determine whether the government might have resorted to expedients which would have avoided impinging on protected rights, although there may well be some reluctance in "second guessing" governments on this. Finally issue (vii) raises the ultimate question of where the balance between the right or freedom at stake and the purposes of the impugned legislation should lie. This involves taking all of the preceding issues into account. It is too early to determine whether the Canadian courts will follow their U.S. counterparts in the United States and establish a formula to assist (or complicate) this process. Whatever aid to analysis is utilized, however, the balancing process should take place within the context of Canadian constitutional, political, legal and social values rather than those of other countries.

3. The Division of Powers

The Canadian Constitution divides the power to make laws between the federal Parliament and the ten provincial legislatures in relation to "matters" that fall within two lists of "classes of subject" set out in the *Constitution Act* of 1867.[9] Under section 91 of that *Act*, the following subjects which fall within federal jurisdiction are:

(a) "regulation of trade and commerce" [section 91(2)];

(b) "the postal service" [section 91(5)];

(c) "criminal law ... including the procedure in criminal matters" [section 91(27)]; and,

(d) "works and undertakings connecting [one] province with any other or others of the provinces, or extending beyond the limits of the province" [section 91(29) and 92(10)(a)].

Section 92 gives the provinces jurisdiction over a list of subjects which includes:

(a) "property and civil rights in the province" [section 92(13)];

(b) "local works and undertakings" [section 92(10)];

(c) "the imposition of punishment by fine, penalty or imprisonment for enforcing any laws of the province" falling within its jurisdiction by [section 92(15)]; and,

(d) "generally all matters of a merely local or private nature in the province" [section 92(16)].

The power to make laws in relation to "matters" that do not "come within" any of the enumerated "classes of subjects" (known as the "peace, order and good government power") is given to the federal Parliament by the preamble to section 91.

These constitutional provisions have naturally been subject to judicial interpretation since 1867. Accordingly, judicial decisions provide some (although not always clear and definitive) guidance on the ambit of the "classes of subjects" and the possibility of overlap between federal and provincial powers, which has relevance to both pornography and prostitution. In particular, the decisions assist in determining the relative ambits of the regulatory power of both levels of government to regulate commercial activities; the relationship of the federal criminal law power to the provincial power to sanction breaches of provincial law; the ability of the provinces to act out of concern about morality; and the location of jurisdiction over matters such as Customs, Broadcasting and Communications, which are not expressly referred to in the *Constitution Act*.

The possibility of conflict between section 91(2) (regulation of trade and commerce) and section 92(13) (property and civil rights) has been reduced by the confining of section 91(2) to the regulation of international and interprovincial trade, and of general trade and commerce throughout the dominion. The power to regulate local trades or businesses within a province lies with provincial legislatures. Although the criminal law power is clearly within the federal domain by section 91(27), it is accepted that the provinces, by virtue of section 92(15), have the power to sanction transgressions of valid provincial law, for example, highway traffic and public health legislation, and in this sense to enact "offences". Moreover, there is no bar to provincial legislatures acting out of a concern for morality. The provinces may legislate morality incidentally as part of a purpose which clearly falls within their jurisdictions, for example, "property and civil rights in the province" and "matters of a merely local or private nature." It is thus legitimate for a province to regulate a business within the province, in part for moral reasons. Provincial attempts to regulate film distribution, sex stores, massage parlours and escort services has been upheld as legitimate exercises of the regulatory power, although the attempts reflect in part a moral impulse. What the provinces clearly cannot do is to legislate the proscription of immoral conduct.

The *Constitution Act* of 1867 makes no reference to the place of certain activities within the division of powers. These were either assumed to fall within a more general category, or were activities which were unknown to the legislators of that era. Customs activity was, of course, well known in 1867. By judicial interpretation it has been placed firmly under federal jurisdiction, as a specific example of "the regulation of trade and commerce" in section 91(2). Broadcasting and electronic communications were unknown at that time. Because of the national and, indeed, international dimensions of this type of activity the courts have reposed jurisdiction in the federal Parliament. However, left unclear is whether the source of the jurisdiction is the "peace, order and good government" power in the preamble to section 91, or the power to regulate interprovincial undertakings in section 92(10)(2).

As the discussion above on morality shows, federal and provincial jurisdiction may overlap in certain areas. The courts have taken the position that as far as possible the jurisdiction of each should be recognized as operable unless there is a real conflict, in which case the federal jurisdiction predominates. In approaching cases in which conflict exists, the Supreme Court of Canada in particular has taken pains to confine the area of conflict as narrowly as possible. [10]

An account of general constitutional considerations would not be complete without reference to the constitutional position of municipalities. Municipalities are corporations which have been created by a provincial government. They have no independent constitutional status. As a consequence, they can exercise only that power which is delegated to them. Any by-law which is passed by a municipal government without enabling legislation, is invalid.

Whether or not a particular kind of power is delegated to the municipalities within a province is governed by a number of factors, including the division of law-making power between Parliament and the provincial legislatures. It is by no means certain, therefore, that a province can or will give municipalities the power they request. Even if a particular power could be delegated, a provincial government may decide that the matter in question should not be controlled at the local level. However, in the areas of pornography and prostitution, the major issue has been whether the provinces have the constitutional authority to legislate. There is no evidence that the provinces have hindered any attempts by municipalities to control these problems by refusing to delegate authority to them. It is apparent that all municipalities have authority to license and otherwise regulate businesses and to zone land use within their boundaries. They also have a limited power to control the highways and public places within their boundaries, to control nuisances and to legislate for the health, safety, welfare and morality of their inhabitants.

As we shall point out later, the main sources of challenge by the courts to the exercise by municipalities of their powers in the areas of pornography and prostitution, has been to strike down provisions which are vague[11] or which, while they have the stated purpose or the appearance of regulation, amount to an attempt to proscribe a particular activity or type of conduct, in effect to enact criminal law.[12]

As will be apparent from our discussion of the *Charter* and the division of legislative powers, attempts to address the issues of pornography and prostitution through law reform are necessarily complex. This intricacy is compounded by the complexity of the issues themselves. The present realities of the issues are addressed in subsequent parts of the Report.

Footnotes

[1] *The Constitution Act*, 1982, ss. 7-14 (enacted by the *Canada Act*, 1982 (U.K.), c. 11)

[2] See K. Swinton, "Application of the Canadian Charter of Rights and Freedoms (ss. 30, 21, 32)" in W. Tarnopolsky and G. Beaudoin eds., *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Butterworths, 1982) at 44-8.

[3] See for example, *Regina and Federal Republic of Germany* v. *Rauca* (1983), 34 C.R. (3d) 97 (Ont. C.A.); *In re Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* (1983), C.R. (3d) 7 (Ont. Div. Ct.), appeal dismissed (1984), 5 D.L.R.(4th) 766 (Ont.C.A.).

[4] See *Koumoudouros* v. *Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont. Div. Ct.); *Schinder* v. *Deputy Minister, Revenue Canada, Customs and Excise* (unreported), 1983, (Ont. Co. Ct.).

[5] See *The Sunday Times* v. *The United Kingdom*, [1979] 2 E.H.R.R. 245 (E.C.J.).

[6] See in *Re Ontario Film and Video Appreciation Society, supra*, note 3.

[7] See W. Conklin, "Interpreting and Analysing the Limitations Clause: An Analysis of Section 1" (1982) 4 *Sup. Ct. L. Rev.* at 75.

[8] See *Re Smith* (1983), 34 C.R. (3d) 52 (Ont. H.C.) *Southam Inc.* v. *Hunter* (1985), 11 D.L.R. (4th) 641 (S.C.C.).

[9] *The Constitution Act*, 1867.

[10] See *Multiple Access Ltd.* v. *McCutcheon* (1983), 138 D.L.R. (3d) 1 (S.C.C.).

[11] See *Hamilton Independent Variety and Confectionery Store* v. *City of Hamilton* (1983), 137 D.L.R. (3d) 499 (Ont.C.A.).

[12] *R.* v. *Westendorp* (1983), 144 D.L.R. (3d) 259 (S.C.C.).

Part II

Pornography

Section I

Pornography as a Social Issue

Chapter 4

What is Pornography?

1. Introduction

Among other tasks assigned to it, our Committee was asked to study the problems associated with pornography, including access to pornography, its effects, and what is considered to be pornographic in Canada. The terms of reference for the Committee did not contain any definition of the term "pornography". Although the term is widely used in popular and academic literature, it does not appear in Canadian criminal law, nor is this term used in other federal legislation dealing with the control of offensive material.

Accordingly, we had first to consider whether we would formulate our own working definition of pornography for purposes of the public hearings, so that interested citizens would know exactly what we wanted to hear about. We decided not to publish such a working definition at the outset of our proceedings, because we believed that an essential part of our work was to hear what Canadians thought was encompassed in the term. Therefore, in the Committee's *Issues Paper*, published in 1983 to promote discussion at the public hearings, we included a description of the present terminology used in federal legislation to describe prohibited material, but did not suggest a definition of pornography. At the public hearings, we received many thoughtful and well-reasoned submissions about what should be considered pornography. The main themes of these presentations will be described below.

Firstly, however, let us examine the terminology used in the present law, and discuss the implications of that terminology for public policy.

2. The Definition in the Present Law

The *Criminal Code* does not use the word pornography in its prohibitions dealing with offensive material. Subsections 159(1) and 159(2)(a) deal with the production, distribution and sale of "obscene" matter. Subsection 159(8) provides that for purposes of the *Code*, any publication "a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence" is deemed to be obscene.

Certain other sections of the *Code* also use the term obscene. Section 160 permits the seizure, forfeiture and disposal of obscene material. Section 161 prohibits distributors from requiring retailers to accept for sale obscene materials along with others, in a so-called "tied sale" arrangement.

In some sections, obscene is used in conjunction with other terms. Section 163 creates the offence of presenting or allowing to be presented "an immoral, indecent, or obscene performance, entertainment or representation". Section 164 makes it an offence to use the mails to transmit or deliver anything that is "obscene, immoral or scurrilous".

In all these sections the key test invalues the application of "community-standards". This community standards test developed in response to the use of the term "undue" in subsection 159(8). The question posed by the community standards test is, essentially, whether the exploitation of sex or of sex and crime, horror, cruelty or violence, is undue in the sense that it exceeds the contemporary Canadian community standards of tolerance. As we shall discuss below in greater detail, the application of this test, whether by judges or juries, can make the interpretation of this provision quite unpredictable.

Other provisions of the *Criminal Code* do not use "obscene" at all. Subsection 159(2) of the *Code* makes it an offence to exhibit a disgusting object or an indecent show. Subsection 162(1) makes it an offence to print or publish in relation to any judicial proceedings "any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals." This use of an injury to public morals test in subsection 162(1) is the only use of such a test in the *Criminal Code* treatment of prohibited materials.

The sections described above feature terminology which is very general. By contrast, a few sections of the *Criminal Code* describe quite particularly the kind of material which will attract the criminal sanction. Take, for example, subsection 162(2). The subsection makes it an offence to publish, in relation to any judicial proceedings for dissolution of a marriage, nullity of marriage, judicial separation or restoration of conjugal rights, any particulars other than the names, addresses and occupations of the parties and witnesses, a concise statement of the charges, defences and countercharges in support of which evidence has been given, submissions on points of law, the summing up of the judge, the finding of the jury and the judgment and observations of the court.

All of the sections dealing with obscene and indecent materials appear in the part of the *Criminal Code* entitled "Offences Tending to Corrupt Morals."

In Schedule C to the *Customs Tariff*[1] we find a prohibition against the importation into Canada of books, printed paper, drawings, paintings, prints, photographs or representations of any kind of an immoral or indecent character. It has been held that this language, too, is to be interpreted on the basis of the community standards of tolerance test. In the guidelines issued to Customs officers to assist in the application of this test, we find a rare use of the actual term pornography. In these guidelines, "hard core pornographic pictures" are described as ones which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and acts like bestiality. Prohibited reading material contains "explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features."[2]

Regulations made under the *Broadcasting Act*[3] present yet another variation on this language. The regulations for AM and FM radio licensees provide that no station or network operator shall broadcast anything contrary to law, or any "obscene, indecent or profane language".[4] The comparable regulations for television licensees prohibit broadcast of anything that is contrary to law or any "obscene, indecent or profane language or pictorial representation."[5]

From the foregoing review of the terminology employed in the various legislative provisions aimed at what may be popularly known as pornography, a number of observations can be drawn. One of the clear impressions is of the lack of uniformity in the terminology. However, although there is a diversity of language, it is noticeable that many of the main provisions refer to obscenity or indecency. The title heading in the section of the *Criminal Code* containing most of these provisions makes it plain that these terms, and these offences, deal with what the legislators regarded as "corruption of morals".

3. What is Obscenity?

This Committee has received many interesting and forceful submissions criticizing the use of the term obscene in the present criminal law. The emphasis of this terminology is almost exclusively on sexual morality (or immorality). This emphasis is captured well by this description of obscenity taken from an early Canadian decision: "something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas or being impure, indecent or lewd".[6] This interpretation echoes the dictionary definition of obscenity: indecency, lewdness, foulness, loathsomeness.[7] Indeed, as was mentioned in the public hearings, the Latin root of obscenity, "obscenus", means foul, repulsive, filthy, morally impure, or indecent.[8]

The emphasis on sexual immorality is at the heart of United States jurisprudence on obscenity. The touchstone for obscenity is that enunciated in *Miller* v. *California*:

> ...whether "the average person, applying the contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest, ... whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and ... whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[9]

Only material which is within that definition is outside the protection of the First Amendment guarantee of freedom of speech.

However, obscenity has not always been identified with the sexually impure. One of the definitions of its Latin root is "ill-omened, unpropitious"[10], and it has been suggested that its English counterpart originally had only this meaning. In Shakespeare's day, we are told, the term obscene meant primarily "offensive to the senses, filthy, foul, disgusting". Only secondarily did it refer to what was offensive to modesty or decency.[11]

In assessing the terminology used in the present law, these historical antecedents of the meaning of obscene are well worth keeping in mind. The main focus of the law does indeed seem to be on the moral, or sexual, aspect of the definition, but there is still an element of the definition which reflects the more general idea of offence and disgust. Consider, for example, the double elements in the definition of obscene, namely sex and crime, sex and horror, sex and cruelty and sex and violence. In Bill C-19 proposed by the Minister of Justice in 1983, the elements of violence and cruelty were detached from the element of sex, thus emphasizing the dual nature of the obscenity definition. The omnibus bill proposed a new definition of obscene:

> ... any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.[12]

We note that although the sense of obscenity involves both the element of moral impurity and the element of disgust or offence, these two elements are not mutually exclusive. To many, the disgust and offence category is a wide one, capable of including offensive sexual material as well as that which is offensive but not sexual. During the course of our work, we saw an image that most particularly seems to be within this category that is offensive without being sexual. The scene is a highway, located in flat country. Military figures are present, moving about in a purposeless way. A large mechanized vehicle with a roller on the front comes down the road toward the viewer and runs over one of the figures who is standing in its path, with his back to the audience. We see first the grisly scene of the machine rolling over the human being, and subsequently, the gory shape on the road which is all that remains of the victim.[13] There was, to our minds, nothing remotely sexual in content or effect about that scene, and yet it was powerfully offensive.

The Williams Committee has said of the term obscenity that "it principally expresses an intense or extreme version of ... 'offensiveness'".[14] The Report of that Committee continues:

> It may be that it particularly emphasizes the most strongly aversive element in that notion, the idea of an object's being repulsive or disgusting: that certainly seems to be the point when a person or animal is said to be, for instance, "obscenely" ugly or fat. [15]

The Williams Committee, quite rightly in our view, points out that there will be obscene things which are not pornographic, illustrating its remark with the observation that it would be obscene to exhibit deformed people at a funfair, but not, in its view, pornographic to do so.[16]

The Williams Committee also trenchantly observes:

> We suspect that the word "obscene" may now be worn out, and past any useful employment at all. It is certainly too exhausted to do any more work in the courts.[17]

We are strongly inclined towards this view. On the one hand, it seems that the "offence" or "disgust" view of the "obscenity" meaning, with its strong subjective element, may cast the net of the criminal law too widely. It is not everything that disgusts or offends that can or should be prohibited; and even when the *Code* seeks specificity by such formulations as "undue" exploitation of violence or sex and cruelty, it is still, in our view, very sweeping. On the other hand, a focus on sexual morality, either alone or primarily, seems to be missing the essence of what is objectionable about much contemporary material. In the course of our hearings and deliberations, therefore, we found ourselves becoming more and more receptive towards the argument that there should be an overhaul of the terminology used in the *Criminal Code*.

Having reached the point of agreeing that an overhaul is in order, however, we must next address the question of what is more appropriate terminology. Significant numbers of people urged that the term "pornography" be adopted as the keystone of the criminal law, and proposed various quite particular definitions of the term. These recommendations, of course, return us to the discussion with which we began this chapter.

4. What is Pornography?

Even more so than in the case of obscenity, the problem of defining pornography is compounded by the vast and varied popular usage of the term. We suspect that the very sound of the word pornography makes it attractive to those who are describing material that ranges from the "naughty", "racy" or "off-colour" to the "hard-core" depictions of violence and degradation. The abbreviation "porn" seems to be welcomed by many as an addition to the litany of four-letter words, in the company of such stalwarts as "muck", "dirt" and "smut". The versatile prefix "porno" combines well to form such amusing, yet appropriate, terms as "pornokitsch" (for pornography with "artistic" pretensions), pornocrat (an inhabitant of the pornocracy which some see established in contemporary culture) and pornostrasse (a street featuring outlets reserved for the sale of pornographic material).

The very wealth of popular applications for the term pornography points to one very interesting dilemma for those who seek to legislate in this area. Almost everyone could say of pornography, in company with Justice Potter Stewart of the United States Supreme Court, "I know it when I see it".[18]

However, because it depends on the standards and sensibilities of the viewer, such a subjective approach to the definitional task would be doomed to failure in the courts.

In the course of our public hearings, we became aware of the wide range of opinion among Canadians about what is offensive. At what could be called the conservative end of the spectrum are views like those of two witnesses at the Edmonton hearings, who want the legal definition of pornography to include any depiction or occurrence of sexual, physical relations outside heterosexual marriage; and those of REAL Women of Canada whose definition of pornographic contains material setting forth representations or descriptions of a person in a nude or suggestive pose or of sexual intercourse, and the promotion, exploitation, glorification or glamorization of promiscuous conduct. At the other end of the spectrum is one memorable presenter at the Montréal hearings who regarded everything as acceptable (not pornographic), except for sexually explicit portrayals of children and representations of sex with the dead. The majority of views, of course, lay somewhere between these two extremes. We describe them in more detail below.

Many legal definitions of obscenity have attempted to take account of this subjective element by including a judgment factor to be applied by courts in determining what is criminal. The *Criminal Code* of Canada, as has been mentioned, uses the community standards of tolerance test, triggered by the phrase "undue exploitation" in the *Code*; the American jurisprudence also refers to the average person applying contemporary community standards. These formulations attempt to account for the role of taste and sensibility in determining what should be prohibited, while trying to limit that subjective component to the views of the mainstream of the community.

We are not convinced that this sort of accommodation to taste on the subjective element is necessary or desirable in the criminal law. Many people at the hearings criticized the community standards test referred to above as unworkable. We think that this component tells us more about the viewer, or hypothetical viewer, of the material than about the material itself. Although we are concerned that persons not be forced to look at or to consume material which they find offensive, we think that provisions aimed at that problem are a better solution than a definition of pornography which contains as a key element, this subjective approach.

We are not concerned here with refining the popular use and extension of the term pornography. We are, however, concerned about finding a definition which will assist in determining what might properly be the subject of legislative control.

A useful starting point for this inquiry is, once again, an examination of the roots of the term. The Shorter Oxford Dictionary on historical principles describes pornography as a description of the life, manners, etc. of prostitutes and their patrons; hence, the expression or suggestion of obscene or unchaste subjects in literature or art. The term is derived from the Greek words for "harlot" and "writing".[19] These origins should remind us of at least one aspect of "pornography" as the term now is used. The term refers to something "graphic", a representation. An object which is not a representation (underwear, for example) could not be said to be pornographic, whether one is using that term in a popular or a more specialized way.[20]

Our review of definitions of pornography given to us at the public hearings, and in the literature, has led us to the conclusion that there are really two types of pornography being discussed by those who have explored this area. Both of these types are encompassed within this general definition offered by the Williams Committee:

> Pornography essentially involves making public in words, pictures or theatrical performance, the fulfilment of fantasy images of sex or violence. In some cases the images are forbidden acts: so it is with images of violence. In other cases, the line that is transgressed is only that between private and public; the acts represented in the images would be all right in private, but the same acts would be objectionable in public.[21]

The notion of a line between private and public takes its meaning from the fact that it is sexual conduct that is at issue. Pornography is said to cross the line because it makes available for voyeuristic interest some sexual act of a private kind. The act is private to its participants, but cast into the public because of the medium in which it is portrayed.

From this common starting point, however, there is some divergence. One sort of pornography is that which could be said to be merely sexually explicit, with very little emphasis on violence or forbidden (in the sense of illegal) acts. As the emphasis on violence or illegality increases, we move to another type of pornography, described by feminist thinkers such as Jillian Riddington and Helen Longino. The real message of such material is said to be sexual exploitation and degradation of its participants, with portrayal of men as aggressors and women as subordinate.

We divide this material into two types here largely for purposes of discussion. Practically speaking, there can be no real dividing line between the two, since interpretation of a particular image depends to such a great degree on shades of meaning and implication, and on what a particular viewer brings to it. Indeed, some feminist observers say that all pornography, even that which is "merely" sexually explicit, conveys these messages of sexual exploitation and degradation. Consider, for example, the photographs in so-called soft-core pornography involving no representations of violence. It was pointed out that these images may portray women as ever eager to accommodate men's sexual pleasure, with no mind or inclinations apart from that. Their eyes are vacant, their mouths slightly open, so that they look mindless. They are shown as nude or partially clad. Males, when they appear at all, are invariably clothed. Women are not shown in poses of mutually enjoyed sex, but often by themselves, displayed as objects for the male onlooker, who is the reader. Their bodies may be divided into zones or pieces by garter belts, the hems of robes, and so on, so that they resemble the "meat chart" at the grocery store meat counter. Their pubic areas are often shaved into "acceptable" shapes, and the labia turned back to provide a better display of their sexual organs. All of these images from so-called soft-core pornography are cited by many witnesses as demeaning to women.

The scheme of describing two types of pornography is adopted here merely to facilitate elaboration and description of what it is that people are saying merits, and does not merit, the attention of the law.

The material which is "merely sexually explicit" we see best described by a definition developed by the Williams Committee, which we have modified to a certain extent. The second type of material is well described by Longino, Riddington, and Dworkin and MacKinnon. We discuss each of these approaches in turn.

The Williams Committee proposes as its own working definition of pornography the following:

> ...a pornographic representation is one that combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity, etc.). A work has to have both this function and this content to be a piece of pornography.[22]

Many people think that pornography has an element of explicit sex to it, suggested by the terms "skin flicks", "nudie magazines" and the like. While somewhat more obscurely, in some minds there is probably also a connection between pornography and sexual arousal. Here again, everyday language is instructive: pornography may be seen as a "turn on", something to "get off on", and so on. The Williams Committee definition does, then, encompass a great deal, if not most, of what the ordinary person would think of as pornography.

For this reason, we think that this definition, with the change which we discuss below, usefully represents one of the types of pornography with which the lawmaker must deal. However, having said that, we nonetheless hasten to point out that from the point of view of the lawmaker, the Williams Committee definition presents a major problem.

The difficulty with the Williams definition as a basis for legislative drafting, is its reliance on an intention to stimulate sexually its consumers, as an element of pornography. We think that the element of sexual stimulation was included in this working definition because of the concern of the Committee for what can be called "the context problem". It was pointed out during the public hearings of our Committee, that an image found offensive in one context, may be quite acceptable in another: a detailed photograph of sexual organs may quite inoffensively be included in a medical textbook, but would offend in a teen movie magazine. A photo of a naked infant being bathed by his or her mother would be acceptable, but a photo of a naked infant, surrounded in a threatening way by leather-clad adults, might not be. In the former case, the issue is about the context in which the photograph appears. In the latter, it is a concern for the context, within the photograph, in which the nude infant is located.

In both cases, persons looking at the photographs will be making certain inferences about what is going on in the photograph and, perhaps, in the mind of its producer. These inferences have a lot to do with someone's determination of whether or not something is pornographic. An observer may infer, for example, that the photograph in the movie magazine is there to arouse the magazine's reader. He or she may infer that the photo of the baby with the leather-clad figures is intended to arouse the reader, at least, in part, because of some other inference, namely that the baby may have something to do with the arousal of the leather-clad figures. Very few observers would infer that the medical book or the photo of the mother bathing her infant, were intended to stimulate sexually the viewer. Thus the impression in the mind of the observer about the presence or absence of intention to stimulate the consumer of the material, will have a bearing on the observer's conclusion about whether material is pornographic. This type of impression is not, of course, the only one which influences the observer's decision about what is pornographic, but it is a significant one.

However, to focus on an intent to promote sexual stimulation as a test in law, simply because it is an element of the "context" analysis, is fraught with difficulty. Our observations of the current market in various types of pornographic material, lead us to suggest that the intent of the makers of most of it has a great deal to do with generating profits, and not very much at all to do with sexual stimulation. Much of this material is stilted, tawdry, and merely gymnastic, and any sexual stimulation connected with it would more likely happen because of the existing mindset of the consumer, than because of the intention of the producer. Any criminal offence which had as a necessary element an intent to bring about sexual stimulation, would, in our view, result in very few convictions. For this reason, we have restricted our use of a "sexual situation" test to only one section of our suggested reforms.

Although we do not think that the Williams Committee definition is an appropriate foundation for the criminal law, we consider that it would be a reasonably popular definition of the sexually explicit sort of pornography. It might be made more exact by the introduction of a small refinement. Thus, we would say that a work is pornographic if it combines the two features of explicit sexual representations (content) and an *apparent or purported* intention to arouse its audience sexually. This formulation is not wholly satisfying because as we have discussed earlier, the emphasis would be on the inference drawn by the observer, and each person's inference would be different. However, to leave only the content branch of the definition means that quite straightforward clinical material in an anatomy textbook would be regarded as pornographic, and that accords with neither the popular understanding nor the proper policies of the criminal law. To depart from an intent standard in favour of an effect standard would not really serve either. If effect were the test, then sexually explicit material which appalled or disgusted rather than aroused would not be within the range, even if the maker's actual intent had been to stimulate.

As for our reservations about the definition for purposes of the criminal law, we have created a scheme of criminal law which does not depend on having first of all elaborated a satisfactory definition of "pornography". We have concentrated on identifying the kinds and types of representations which we believe merit a criminal sanction, without striving to attach to one or the other of these types any particular legal or popular label. The terms obscenity, pornography and erotica all have such an elaborate web of primary, secondary and popular meanings, and so many different connotations dependent on the background of the particular person, that we have decided to avoid them for purposes of the criminal law. Similarly, where we believe that context should be taken into account in determining whether to impose a criminal sanction, we have spelled out what we think should be the defence, rather than relying on the presence or absence of an intent to stimulate sexually.

This popular or general definition of pornography, as we have said above, really does not take account of what some persons appearing before us have called "the new pornography". In the terms of the description in the Williams Committee, its images are fantasy images of sex and violence, which involve forbidden acts of violence.

Although these kinds of images might be included in the broad definition, there is almost no real profit in doing so. In fact, to include them would be to submerge them in the general, and to blunt the meaning which these images have assumed in the contemporary pornography debate. Accordingly, we consider it highly worthwhile to study this type of material separately, and to explore the popular definition of it, so that we can understand its implications for lawmaking. The origin of the word pornography in the classical Greek, meaning a description of the life and manner of prostitutes and their patrons, is one point of departure for those who theorize about the new pornography. From this root, it is argued that in pornography, women are graphically depicted as whores by nature. All women are demeaned by such a portrayal, and the humanity and aspirations of all women are circumscribed within this narrow compass.

Helen Longino defines pornography in the sense that we have been discussing. After pointing out that not all sexually explicit material is pornography, nor is all material which contains representations of sexual abuse and degradation pornography, Longino continues:

> What makes a work a work of pornography, then, is not simply its representation of degrading and abusive sexual encounters, but its implicit, if not explicit, approval and recommendation of sexual behaviour that is immoral, i.e., that physically or psychologically violates the personhood of one of the participants. Pornography, then, is verbal or pictorial material which represents or describes sexual behaviour that is degrading or abusive to one or more of the participants *in such a way as to endorse the degradation.* (emphasis in original)[23]

Longino writes that behaviour that is degrading or abusive includes physical harm or abuse, and physical or psychological coercion. She would also classify as degrading "behaviour which ignores or devalues the real interests, desires, and experiences of one or more participants in any way."[24] We were referred to this definition in the course of the public hearings, as well as to a similar formulation by Jillian Riddington:

> a presentation whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of power is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the representation, and in which such behaviour can be taken to be advocated or endorsed.[25]

This approach to pornography has been given legislative expression in a by-law passed by the City of Indianapolis to control pornography.

The by-law defines "pornography" as follows:

> Pornography shall mean the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that includes one or more of the following:
>
> (1) women are presented as sexual objects who enjoy pain or humiliation; or
>
> (2) women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or as dismembered or truncated or fragmented or severed into body parts; or
>
> (4) women are presented being penetrated by objects or animals; or
>
> (5) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy and inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.[26]

The drafters of the Indianapolis Ordinance, Andrea Dworkin and Catharine MacKinnon, also drafted a by-law for the City of Minneapolis, which was passed by Council but not approved by the Mayor. The Minneapolis by-law includes, besides those elements set out above, these four:

(i) women are presented dehumanized as sexual objects, things or commodities;

(ii) women are presented in postures of sexual submission;

(iii) women's body parts — including but not limited to vaginas, breasts and buttocks — are exhibited, such that women are reduced to those parts;

(iv) women are presented as whores by nature.[27]

Although these two definitions are framed in terms of depictions of women, both by-laws also provide that the use of men, children or transsexuals in the place of women in these depictions is also pornography.

One of the crucial components of thinking behind these definitions of pornography is the association between pornography and misogyny, or woman-hating. The architects of the Indianapolis by-law, Andrea Dworkin and Catharine MacKinnon, contend that over the ages, the influence of pornography on men who rule societies has produced misogynist institutions. Only now that changes in technology and the market have brought pornography into widespread circulation have we begun to appreciate this connection.[28] Others may argue that misogyny is expressed in pornography, but not created by it. Whichever argument is advanced, there is said to be a clear and unmistakable link between pornography and women-hating.

What is common to both of these approaches in viewing the relationship between pornography and misogyny, is that they see pornography as part of a political problem, relating to power imbalances in society. As such, it is a manifestation of a moral problem, taking the term "moral" in its wider sense, and not merely an issue of sexual morality. The point is made that use of the term obscenity, with its connotations of sexual morality, at best confines the problem too narrowly. At worst, it misstates its essential nature. Accordingly, some of the persons holding this view wish to replace obscenity in the *Criminal Code* with pornography, giving that term a definition consistent with the Dworkin/MacKinnon theory.

In our view, this theoretical approach to pornography (or to the "new pornography") is a valuable contribution to the debate. We think that the shape of the law should be taken not just from the general understanding of pornography expressed in our reworking of the Williams Committee's definition, but also from an awareness of the particular violence to women's aspirations and equality which figures in many of these representations. Again, however, we see some difficulties in completely absorbing into the *Criminal Code* the definitions proposed, particularly the Indianapolis by-law definition. We are concerned about having in the criminal law very broad terms that would cover a wide range of conduct. To criminalize images that present women as commodities would catch much of contemporary advertising, and we think that such an approach to the problems in advertising would be regarded as contrary to the *Charter of Rights* guarantee of freedom of expression: it is not a "reasonable" limit on the right. Similarly, a prohibition on presenting women as whores by nature might be regarded as so vague as to offend the freedom of expression guarantee.

However electrifying these concepts may be in popular or academic thought, it remains inescapable that a regime of criminal law requires more precision and restraint than is in the Indianapolis or Minneapolis by-law definitions. Thus, while we believe that the thinking about the new pornography should influence public policy, we have refrained from incorporating the particular formulations presented to us into our draft legislation. We have, as we discuss below, identified certain kinds of representations which we believe merit the criminal sanction, and have tried to describe these specifically rather than setting out a conceptual definition in the law. We have also recommended changes to the hate literature section of the *Criminal Code* to recognize that pornography may be hate literature directed toward women.

5. Pornography and Erotica

Not all of those who seek changes in the criminal law advocate the use of the pornography terminology and approach as described. They comment within the framework of the existing law, with its emphasis on sexual morality, professing themselves content with the existing obscenity terminology. There is, however, much common ground occupied by those who have complaints about the present law, whether their orientation is toward the use of the pornography terminology or not.

One such area of agreement is to draw a distinction between pornography or obscenity on the one hand and "erotica" on the other. Erotica, as defined by Margaret Laurence, is the portrayal of sexual expression between two people who desire each other and who have entered this relationship with mutual agreement.[29] Gloria Steinem defines the erotic as a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice.[30] Briefs submitted to the public hearings echoed these definitions of erotica.

In the recent decision of Mr. Justice Shannon of the Court of Queen's Bench of Alberta in *R.* v. *Wagner*[31] the court declined to convict the accused under section 159(8) of the *Code* where the videotape in question was erotic. He accepted the definition of erotic presented to the court by Professor James Check, a definition very similar to those of Gloria Steinem and Margaret Laurence given above. In the judge's words, the definition of "sexually explicit erotica" is material which "portrays positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality".[32] There is no aggression, force, rape, torture, verbal abuse or portrayal of humans as animals. The court found that contempory Canadian community standards would tolerate erotica, so defined, no matter how explicit it might be.

Another slightly different, but entirely compatible, view of erotica is that taken by the Williams Committee. According to them, the erotic is what expresses sexual excitement, rather than causes it. In this sense, the erotic work will suggest or bring to mind feelings of sexual attraction or excitement. Referring back to its earlier definition of pornography as that which intends to cause sexual excitement, the Committee adds that erotic material may cause feelings of sexual excitement and put the audience actually into that state, but if so, that is a further effect. It follows from the Committee's definition, therefore, that what is represented in an erotic work of art need not be just a "milder version" of the pornographic. Indeed, many erotic works of art have no explicit sexual content of any kind,[33] and would thus not be regarded as pornographic at all.

We appreciate this separation of the erotic from the pornographic, and agree with it. We have not, therefore, considered it appropriate to adopt the working definition of pornography proposed by the Badgley Committee: "The depiction of licentiousness or lewdness: a portrayal of erotic behaviour designed to cause sexual excitement."[34]

Many briefs stressed the importance of devising a legal regime which would not criminalize erotica, in order to reach pornography. Some saw the absence of true erotica in the Canadian culture as one reason why young people turn for information about sexuality to magazines and films which teach them that sex is violent and brings pain. Other briefs pointed out that a real harm of pornography is (in the straightforward words of one presenter), that it tells lies about women. Erotica, on the other hand, does not lie about women, or about their sexual partners. Erotic literature or art created by women, it was argued, will do much to counteract the message that is propagated in pornography; it will provide a voice for the expression of what women really are. Not only women, but also men and young people of both sexes will benefit from this development.

We agree strongly that the criminal law should not stifle the development of erotic art. Nor do we want to fashion a criminal law regime that, in the name of protecting women, may serve to silence them. We do not, however, think that including a specific exemption for the "erotic" in the *Criminal Code* is the way to achieve these ends. Once again, while accepting the popular, or non-legal meaning of erotica, and the thinking behind its characterization, we have chosen to avoid the use of the specific term in our draft *Code* provisions. Instead, we have tried to be limited, and clear, about what we seek to expose to a criminal penalty, so that the "chilling effect" of our recommendations on genuine erotic expression will be minimized.

6. Conclusions

We have not tried to distil from the variety of popular meanings a pithy definition of pornography. In the discussions in this Report, we use the term pornography fairly generally and in the popular sense described in this chapter, because we are talking about what people complained to us about. When we come to our recommendations, however, we do choose specific terminology. Whereas we consider that it is natural and inevitable that different understandings of the term will proliferate in the public mind, we have decided to avoid for the most part use of "pornography" for legislative purposes. We are impressed with the variety of meanings attached to the term, and do not wish to import these into a system which we think should be characterized by clarity and certainty. We have similarly decided not to incorporate the term erotica into our recommended provisions. The only exception to this rule occurs in the titles of the sections we have drafted, for there we use the term pornography. It is, in that context, very carefully defined by specifying what sorts of acts are at issue.

For different reasons, we are recommending that the term obscene be retired from the criminal law and related federal legislation. It will simply not encompass the kind of material which is being described as the new pornography, and to rely on the opinion of the hypothetical viewer for its interpretation (the community standards test), introduces an element of subjectivity with which we feel uneasy.

Although we have avoided the formulation of our own brief working definition of pornography, we have been very aware of the two main sorts of pornography which preoccupy those concerned with this issue. Some would say that these are really one type, but in our effort to understand the phenomenon, we have left the apparent distinction as it stands, at least for purposes of analysis. One sort of material is the merely sexually explicit, characterized by both sexual content and an assumed or apparent intention to stimulate sexually the viewer. Missing from this sort of pornography is any appreciable amount of violence and degradation. Again showing the sexual content, but this time in combination with violence, degradation or abuse in such a way as to suggest approval of that abuse, is the second category of pornography. The theoretical underpinnings of our contemporary appreciation of this sort of material are laid by such thinkers as Jillian Riddington, Helen Longino, Andrea Dworkin and Catharine MacKinnon.

We believe that our recommendations must encompass both of these two large, and admittedly loosely defined, areas of pornography. Clearly, not all of it will merit criminal sanctions. Much may attract only regulation; other material will simply be left to individual taste and discretion. If we do not formulate our own precise working definition of pornography, though, there are those who will be wondering on what basis we will make these kinds of distinctions.

As we have mentioned above, our approach has been to try to define as precisely as possible the kinds of images and representations which deserve a criminal sanction, or regulation. We have done this by calling into play the principles enunciated at the beginning of this report. Of all the images and types of images there may be, we have tried to determine which sorts merit the criminal sanction because of the extent and degree of their harm to these principles, which ones may we more appropriately leave to regulation because the nature and extent of their impact may be more in the area of "offence" than of harm, and thus containable by means other than the criminal law; and which should simply be left alone. In coming to our own determinations on these points, we have been very conscious of our debt to those who have struggled with the question of the meaning of pornography, whether we agree with them or not. They have created an intellectual matrix for these discussions which, we venture to suggest, is richer and more challenging than that of a few years ago. We shall describe in some depth in Section IV the provisions which we propose for the criminal law and related statutes. Now let us turn to an examination of what we have been told and what we have learned about the reality of pornography in Canada today.

Footnotes

[1] *Customs Tariff Act*, R.S.C. 1970, c. C-41, as amended.

[2] Revenue Canada, Customs and Excise, Memorandum R9-1-1, Ottawa, July 1, 1982, at Item 28.

[3] *Broadcasting Act*, R.S.C. 1970, c.B-11, as amended by S.C. 1970, c.16 (1st Supp.), s. 42; c.10 (2nd Supp.), s. 65 (Item 2); S.C. 1974-75-76, c.49, s.18.

[4] *Radio (A.M.) Broadcasting Regulations*, C.R.C. 1978, c. 379, s.5(1)(a) and (c) respectively; *Radio (F.M.) Broadcasting Regulations*, C.R.C. 1978, c.380, s. 6(1)(a) and (c) respectively.

[5] *Television Broadcasting Regulations*, C.R.C. 1978, c. 381, s.6(1)(a) and (c) respectively.

[6] *R.* v. *Beaver* (1905), 9 O.L.R. 418 (Ont. C.A.), *per* MacLaren, J.A. at 424.

[7] *The Shorter Oxford English Dictionary on Historical Principles* (3d ed.) (Oxford, The Clarendon Press, 1973) Vol. II, at 1428. For a discussion of the evolution of this dictionary definition, see *Badgley Report* at 1079 and at 1086.

[8] *Cassell's New Latin-English English-Latin Dictionary* (London, Cassell & Company Ltd., 1959), at 403.

[9] 413 U.S. 15 (1973), at 24.

[10] *Cassell's New Latin-English English-Latin Dictionary.*

[11] Law Reform Commission of Canada, Working Paper 10, *Limits of the Criminal Law; Obscenity: A Test Case* (Minister of Supply and Services Canada, Ottawa, 1977), at 8.

[12] See s.19 of Bill C-19, 1983.

[13] This scene was contained in the film of "outtakes" from the Ontario Censor Board.

[14] Williams Report, para. 8.4, at 104.

[15] *Ibid.*

[16] *Ibid.*, para. 8.6, at 105.

[17] Williams Report.

[18] *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964), at 197.

[19] *The Shorter Oxford English Dictionary on Historical Principles* (3rd), Vol. II, at 1631.

[20] Williams Report at 103.

[21] Williams Report at 96.

[22] Williams Report at 103.

[23] Helen E. Longino, "Pornography, Oppression, and Freedom: A Closer Look". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 29.

[24] *Ibid.*, at 29-30.

[25] Jillian Ridington, *Freedom from Harm or Freedom of Speech?* a discussion paper prepared for the National Association of Women and the Law, Ottawa, 1983. Among those recommending adoption of this definition are the Newfoundland Teacher's Association, the New Brunswick Advisory Council on the Status of Women, and Le Regroupement Féministe Contre la Pornographie, which has translated the definition into French, as follows:

La pornographie est une représentation réelle ou simulée, en mots ou en images, filmée, sur bande vidéo, ou sous toute autre forme, de comportements sexuels, dans laquelle un-e ou plusiers des participant-e-s sont ouvertement ou implicitement contraint-e-s à cette participation, ou sont blessé-e-s ou molesté-e-s physiquement ou psychologiquement: comportement dans lesquels un déséquilibre de pouvoir est évident ou implicite du fait de l'immaturité en âge de tout-e participant-e, ou du fait de certains aspects du contexte de la représentation; représentation dans laquelle ces comportements peuvent être interprétés comme étant encouragés ou endossés.

[26] City-County General Ordinance No. 24, 1984 (June, 1984), Sec. 16-3(v).

[27] An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, 1983, Adding a new section (gg) to Section 139.20.

[28] Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin, Re Proposed Ordinance on Pornography, December 26, 1983, at 1.

[29] Margaret Laurence, "On Censorship (A Speech Given to the Ontario Provincial Judges and Their Spouses), Peterborough, Ontario, June 2, 1983 (unpub. Ms.), at 9.

[30] Gloria Steinem, "Erotica and Pornography: A Clear and Present Difference". Laura Lederer, (ed.), *Take Back the Night: Women on Pornography* (Toronto & New York, Bantam Books, 1980) at 23.

[31] 16 Jan. 1985, unreported (Alta Q.B.).

[32] *Ibid.*, at 19.

[33] Williams Report at 104.

[34] Badgley Report, Vol. II, at 1080.

Chapter 5

Views from the Public Hearings

1. Introduction

Any attempt to summarize in a few pages the views presented by hundreds of different organizations at public hearings in 22 different centres across Canada might seem to be an impossible task, doomed to failure, particularly when one considers the wide divergency in the views held by these organizations. Analysis of the briefs submitted at the hearings showed that there is a wide range of opinion among Canadians about what is offensive and what should be considered pornographic.

At the conservative end of the continuum are those who want the legal definition of pornography to include any depiction of sexual activity, whether it be inside or outside of marriage, or any depiction of persons in nude or suggestive poses. At the other end of the spectrum are those who found all pornography acceptable, except for explicit sexual portrayals of children. Between these two extremes, there was a wide range of opinion as to what is acceptable. The position of most feminist groups, and some church organizations, was that erotica, which they described as sexually explicit material which contains no violence or coercion and in which the participants were there by choice, was acceptable. They were totally opposed however, to violent pornography, which they defined as material with a sexual content combined with violence, degradation and abuse, with men shown as the aggressor and women as the subordinate or victim.

Indeed, despite the differences of opinion as to what should be considered pornographic, there was consensus in this area: the question of what should be done about violent pornography. A large majority of presenters expressed strong concerns about the prevalence of violent pornography and urged that government controls be strengthened to ensure that such material is kept off the newsstands and is prohibited on television.

The witnesses and groups favouring controls came from women's organizations, churches and church groups, with a smaller number of community organizations and educational associations, such as teachers' federations in several provinces. There were also a few men's organizations, which had been set up specifically to oppose pornography, a sprinkling of elected representatives from every level of government, some municipal officials, and some representatives of police forces or police unions.

Opposed to control or censorship of pornography were: firstly, civil liberties groups, some professional associations and film and video organizations; secondly, the Periodical Distributors Association, the Video Retailers Association and a handful of retailers in a few cities; and thirdly, gay rights organizations in major cities.

In its analysis of the briefs from such a wide diversity of organizations, the Committee found that the majority of submissions had concentrated on similar aspects of pornography, although some focus more strongly on certain issues. Large numbers of briefs described the proliferation of pornography in their own communities and many reported on their efforts to control or prohibit its availability, either through the use of municipal by-laws, provincial censorship powers over movies, or local enforcement of *Criminal Code* provisions prohibiting obscene materials.

There was considerable discussion of a new definition of pornography and of the difference between pornography and erotica. Many briefs explored the issue of the link between pornography and violence and supported their positions with local anecdotal evidence, as well as reference to academic research studies, many of which were from the United States.

We received numerous recommendations, some in considerable detail, for changes to legislation at all three levels of government. At the federal level, major changes to the *Criminal Code* provisions on obscenity were proposed, as well as to the *Customs Act*, the *Broadcasting Act* and regulations of the Canadian Radio-Television and Telecommunications Commission. At the provincial level, there were strong suggestions that provincial censorship or classification boards, which now censor and classify movies for public showing, should also deal with home videotapes. At the local level, there was unanimous support for the introduction of municipal by-laws to control the display of pornographic magazines and videotapes so as to keep them out of sight of children.

2. The Prevalence of Pornography

Many groups, in preparing their briefs, had conducted local surveys to determine the type and availability of pornography in their own communities. The Manitoba Advisory Council on the Status of Women reported, for example, that a random survey of 17 local retail stores in Winnipeg revealed that only two of the stores did not sell pornographic material. In the others, the material ranged from two to well over 400 different examples of pornography. The London Status of Women Action Group reported that over 80 percent of local variety stores sell pornography, with many having as many as 100 different titles in stock. Community Against Pornography in St. John's was particularly incensed over the use of government funds and community halls by male service clubs to show pornographic movies at club social functions.

Many expressed their concern at the increasing amount of violence, both in pornographic magazines and videotapes, as well as in movies shown in public theatres. The Canadian Federation of University Women, in Toronto, quoted a report from Mary Brown, director of the Ontario Film Review Board which estimated that in 1982 only one film in twenty contained sexual violence. By 1983, it was one film in nine.

The effect of pornography on women, children and on society as a whole was described in sensitive terms by some church as well as lay organizations:

> In recent years, pornographic publications and movies have become more and more explicit as well as more readily available. Pornography victimizes and debases women by portraying them as mere objects, and degrades men by portraying a stereotype of aggression. Pornography increasingly uses children as subjects, and increasingly depicts and incites to violent behaviour.
> *Anglican Diocese of Toronto*
>
> Pornography does not recognize or celebrate the holistic reality of our humanity, the integration of body, mind and spirit. Pictures and descriptions reduce women to sexual parts, mindless bodies to be played with, poked or even mutilated ... Pornography fails to recognize the wide range of emotions made possible by human encounters ... Pleasure for men is portrayed through acts of inflicting pain or exercising power. Women, supposedly, find pleasure in experiencing pain ....
>
> Pornography promotes racism ... (and) supports and promotes the belief that female sexuality is dirty or evil ... (It) perpetuates the terrible myth that sexual violence is deserved and needed by the normal female ....
> *United Church of Canada, London*
>
> ... the nihilism of pornography can only be considered as anti-life, harmful to the dignity of people and to the development of sane and lasting personal relationships as the basis of healthy family life. Because it fails to accept sexuality as a unique gift for understanding and for creating new life in the image of another person, pornography is anti-sex.
> *Canadian Conference of Catholic Bishops, Ottawa*

Of particular concern to municipal officials who participated in the public hearings was the difficulty encountered in trying to draft and enforce by-laws to control or prohibit pornography. Additionally, several cities, among them Ottawa, Toronto and Vancouver, complained that the present *Criminal Code* provisions on obscenity are so nebulous and so open to various interpretations, that they are extremely difficult to enforce.

> We have ... a situation in Vancouver where 15 charges of obscenity were laid against an adult entertainment store in January of 1983. The case has been adjourned pending an appeal on yet another case in Victoria where a decision is expected shortly. However, if the Victoria decision finds for the prosecution, local Crown Counsel expect that that decision will be appealed all the way to the Supreme Court of Canada and they want a ruling at that level before proceeding with any other charges. Obviously, there is little point in laying new charges at this time, yet the Police Department has cabinets

> full of books, magazines and videotapes which they deem to be obscene. The distributors of these materials are still in operation.
> *Alderman May Brown, Vancouver*

The Committee received many different estimates regarding the size of the pornography industry in Canada and North America. The Canadian Coalition Against Media Pornography, Ottawa, estimated that in North America the income grossed by pornography "ranges from $12 billion a year to $50 billion a year, not including videos. In Canada, estimated earnings from pornography controlled by organized crime is $500 million a year." David Scott, of Toronto, told the Committee that after discussions with law enforcement personnel he formed the view that these sales figures are significantly inflated by the money from other criminal activities being "laundered" through the pornography industry: profits from drugs, racketeering, and loan sharking. He estimated that conceivably two thirds of the income is laundered money.

In each city in which public hearings were held, the Committee was provided with samples of pornography and descriptions of the nature and availability of pornography in that community. In Montréal, Monica Matte observed that the line between soft and hard core material is disappearing. She presented an exhibit of pornography available from one downtown store. It featured incest of all kinds, explicit sexual representations of pregnant women, bondage, racial pornography, child pornography and child prostitution. Excerpts from some of the descriptions of pornography follow.

> ... [the] images present in the mass media have become ever more pornographic over the last decade. Society has increasingly allowed these images to become an acceptable and normal component of entertainment. The juxtaposition of "sex" and overtly aggressive behaviour, from beatings to rape, is commonly found on prime-time television. Each time a new frontier of violence and sexual exploitation is crossed by mass culture, traditional pornographic images become more violent and explicit.
>
> ... [in soft-core pornography] the images of women ... are exclusively vulnerable and available. Women are often referred to as "girls" or by even more denigrating terms, and they exist solely for the sexual gratification of male masters. Soft-core pornographic magazines such as *Playboy* and *Penthouse* depict women on their backs or in crawling positions, often with their buttocks or vaginas displayed for male approval. The positions signal total submission.
> *B.C. Teachers Federation, Vancouver*

> Examination of soft-core magazines shows that there is much more incest, pedophilia, and violence and humiliation of women than there was ten years ago. [We see as pornographic] material which is produced with the intention of or effect of sexually stimulating the consumer *by the portrayal of a power relationship* .... The mere fact that material has the effect of sexually stimulating the consumer does not make it pornographic.
> *Toronto Area Caucus of Women and the Law, Toronto*

> Pornography is yet another way to silence women. Most women ignore pornography; it is marketed by men for men. The instinctive reaction of many women to pornography is revulsion. The increasing violence, abuse and degradation of women in pornography reveals it to be not about sex or love,

> but about power of men over women. A common thread running through it is that women are animals, slavishly devoted to carnally pleasing their masters, who are fully dressed, rational and in control of them and the situation.
> *Young Women's Christian Association, Winnipeg*
>
> [We] feel in danger of being swamped with a flood of pornography - magazines, movies and now videotapes, almost all made outside Canada. Our very culture is being undermined and our way of life threatened.
> *Canadian Federation of University Women, Toronto*

3. The Effect of Pornography

The effect of pornography on women, children and society was described in considerable detail in many briefs. The concern of most participants was threefold: that pornography degrades women, robs them of their dignity as individual human beings and equal partners within a relationship and treats them as objects or possessions to be used by men; that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others; and thirdly, that these two influences will have a strong negative influence on children and on the family.

> All pornography degrades women. The spectrum of soft to hard core is often alluded to, with the implicit or explicit connection that hard core pornography is dangerous, while soft core pornography is not, or at least, not so dangerous. We dispute this. All pornography is dangerous to women, because it robs us of our dignity, the right to be treated with respect as complete beings, and it squanders our needs as men and women to engage with others as equals.
> *Manitoba Advisory Council on the Status of Women, Winnipeg*
>
> The dignity of women is undermined, dehumanized, and [they] are seen by men as objects, possessions to be used as they see fit, which contributes to the problem of battered women. Even the most mild form of pornography is harmful. The values which support family love, mutual respect, and generosity are undermined, and lust, exploitation, selfishness are promoted.
>
> The growing presence of pornography harms society [because] it:
>
> 1) increases violence;
>
> 2) damages family relationships;
>
> 3) influences young people to engage in pre-marital sex;
>
> 4) children are harmed and exploited.
> *Concerned Morality League, Winnipeg*
>
> Nous considérons en effet que *toute pornographie*, qu'elle soit douce ou "dure" et même dans les cas où elle ne recourt pas explicitement à la violence *est violente* lorsqu'elle suggère que les femmes ont pour unique fonction d'exciter sexuellement les hommes, qu'elle les ravale à l'état d'objets destinés à être manipulés, exploités, dégradés, qu'elle les réduit à leurs seuls organes sexuels, qu'elle refuse aux femmes tout statut d'égalité et d'humaine autonomie. Cette perception de la femme est incompatible avec la dignité humaine. La pornographie alimente des attitudes et des comportements foncièrement sexistes, discriminatoires à l'égard des femmes alors même que notre société prétend promouvoir l'égalité des femmes. Il y a certes une grave incohérence à se préoccuper des problèmes du viol et des femmes battues

alors que l'on permet que des femmes soient agressées et violentées à l'écran, sur photos, dans les livres ou de toute autre façon.
La Fédération des Femmes du Québec, Montréal

Pornography is unacceptable not because it portrays explicit sex but because it promotes hatred, violence, degradation and dehumanization. Pornography is sexist material that portrays women as a distinct sub-human species that does not feel pain or humiliation in the same way as men, and which desire violence and degradation for sexual pleasure. Pornography advocates, encourages and condones coercion, sexual violence and battering and portrays these activities as normal behaviour. As an expression of sexist ideology, pornography promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged.

Women are ... terrorized by the message that male violence and power is so prevalent and menacing. Pornography alienates women and men. In no way does it foster healthy sexual or human relations any more than other forms of hate literature would foster healthy relations between races or religions.
Ontario Advisory Council on the Status of Women, Toronto

... exposure to pornography leads to an increase in violent sexual crimes and aggressive anti-social behaviour. The person exposed to pornography is being conditioned to think that not only is violence socially acceptable, but that it is sexually stimulating and that the person who is unwilling to be the recipient of the violent act will enjoy it if forced to submit ... Pornography suggests that a woman's value lies in her physical appearance and her ability to sexually satisfy a man. All other capabilities are trivialized ... Pornography undermines values that are important to our society because it dehumanizes the participants, desensitizes the viewers to the suffering of others, and distorts mutual, caring expression into a base act committed by a powerful figure upon a powerless object.
Provincial Advisory Council on the Status of Women, St. John's

Pornographic material ... makes us inclined to accept violence, to downgrade and even deny the dignity of other people, and to unleash our tendencies to dominate others ....
Canadian Conference of Catholic Bishops

Pornography negates sexuality as an expression of love and a form of intimate communication between equal human beings. It focuses merely on parts of the body ... (and) ignores mind and spirit, and turns human beings into objects.
United Church of Canada, Toronto

[Pornography] distorts wholesome and God-given sexual relationships (and) exploits them for profit, so that persons who, in God's purpose, are capable of and deserving of fulfilling personal relationships are deceived into accepting debased fantasies in place of love and commitment.
Anglican Diocese of Toronto

Pornography desensitizes people to each other and destroys the foundations of love, of family, and of human relationships.
Salvation Army, Toronto

One of the most interesting perspectives on the effect of pornography on children, its effect on young boys, was presented by one of the few men's organizations to appear at the public hearings, Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle (Men Against Pornography), Québec City.

> Il est malheureux de constater que la sexualité des hommes gravite beaucoup autour de la pornographie ... Tout cela n'est pas surprenant, car c'est souvent à partir de la pornographie que les hommes apprennent à donner forme à leurs désirs, y puisent leurs "techniques" et leurs croyances par rapport à leur sexualité. Cet apprentissage commence très tôt dans la vie. Pour la plupart des hommes de notre génération, c'est dès le début de l'adolescence que nous avons commencé à consommer de la pornographie. C'est surtout là que nous avons tiré nos critères de performance sexuelle, de virilité et ce que nous croyons savoir sur la sexualité féminine. Il en va de même de la génération des 15-20 ans: une enquête menée par un professeur de sexualité du CEGEP Lévis-Lauzon auprès d'étudiants de 19 ans a montré que 98.5% d'entre eux avaient déjà "consommé" de la pornographie, et ceci en moyenne dès l'âge de 13-14 ans. Un sommet semblait atteint vers 17 ans, pour diminuer ensuite. Mais l'apprentissage était fait. Dans un atelier que nous avons récemment animé, un des hommes présents a avoué qu'il avait commencé à regarder les revues pornographiques de son frère à l'âge de 8 ans. Même avant l'éveil de sa sexualité adulte, il avait déjà la tête pleine d'images pornographiques qui allaient orienter ses désirs dès leurs premières manifestations à son adolescence.
> *Le Groupe d'hommes contre la pornographie et l'exploitation sexuelle, Québec City*

While most of the briefs focused on the social harms that are caused by pornography, one economist described the effects which pornography has on women's position in the economy.

> ... it is not pornography, existing independently, that threatens women's acceptance into and contribution to our economic infrastructure, but pornography as a particularly invidious form of sexism that has thus far defied our legislators in their attempts to protect women from sexual discrimination. Only an intrinsically sexist society could so wholeheartedly support (financially and legally) the sheer volume of pornographic materials available ... it is pornography, the most visible and virulent symptom/form of sexism that may continue to segregate women's abilities from the economic mainstream long after legislation protecting equal pay for work of equal value, or prohibiting sexual harassment, or even encouraging affirmative action is in place and is being practised ... [Pornography is] as much to blame for the slow integration of women into our economic framework as any other manifestation of sexist attitudes.
> *Carl Beigie, economist, Toronto*

4. Definitions of Pornography

The nature of pornography and how it should be defined created a great deal of discussion during the public hearings. The discussion raised two important questions: first, the difference between pornography and erotica, and secondly, the question of where, in the continuum of sexist portrayals of women in the news media, the portrayal of women becomes actually pornographic. While many definitions were proposed, the three most often quoted definitions were those developed by Helen Longino, an American feminist and writer, by Jillian Ridington, a Vancouver researcher, and by Andrea Dworkin and Catharine MacKinnon, of Minneapolis. All of these definitions are discussed in the previous chapter.

Helen Longino's definition, which was quoted in many briefs, is as follows:

> Pornography is verbal or pictorial material which represents or describes sexual behaviour that is degrading and abusive to one or more of the participants *in such a way as to endorse the degradation*. (Emphasis in original)

The distinction between pornography and erotica created differences of opinion between groups with a feminist perspective and those on the conservative end of the spectrum. According to many groups, the distinction is crucial.

> [Erotica] represents images in which the participants are not degraded or abused and are presented as participating equally and freely. Erotica celebrates the positive, healthy experiences of mutual sexual enjoyment between adults.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

> Erotica is for sexuality, since its message implies a mutually pleasurable expression between people; pornography is about commercialized sex, dominance, conquest, and violence against women. Erotica suggests a more balanced power relationship and respect for the body; pornography forces a distorting commercial relationship between the conqueror and victim, and hence is degrading to both male and female.
> *Deborah Seed, Montréal*

The conservative position on erotica was that it should be included in the definition of pornography and prohibited or controlled.

> ... consensual sex, as portrayed in the media, can be destructive of Canadian societal values ... Depictions of explicit, consensual sex would lead to an expectation that any woman will consent, leading further to coercion in real man-woman relationships. Even depictions of loving, indeed marital, sexual intimacy in full, explicit detail ... ultimately dehumanizes sexuality itself ....
> *Roman Catholic Archdiocese of Toronto, Toronto*

> ... there is a direct relationship between habitual exposure to standard sexual material referred to as "erotica" and an increased desire for more bizarre material .... If the people in the representation ... seem to be "consenting adults" rather than people involved in "degrading" or "demeaning" activity, the material could still be pornographic .... Pornography should be defined so as to include ... explicit sexual acts.
> *REAL Women of Canada, Toronto*

4.1 Pornography as Part of a Continuum

The view that pornography was only the extreme end of a continuum of sexist portrayals of women was held by many of the organizations which presented briefs to the Committee. As one participant put it, "pornography is the heartbeat of a sexist society." It reflects and reinforces the sex-role stereotyping and existing inequalities of the larger society, reflecting the power relationships of males and females, as well as those in adult-child relationships and inter-racial relationships.

> Media Watch considers that sex role stereotyping of women creates an environment that encourages the dehumanization, misrepresentation and

degradation of women. The extreme form of this attitude is pornography. Presently our environment is polluted with messages that tell us women are powerless, feebleminded, submissive, victims, and only valuable if they are young, beautiful and white ....

Male dominance and female submissiveness are at the very heart of the stereotype of men and women. Pornography is the extreme portrayal of dominance-submissiveness, the objectification and the abuse of women. Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.
Media Watch, Calgary

Pornography has an important function in society's oppression of women. It is the propaganda, the prop, supplying men with examples of society's model of masculinity. Pornography helps to ensure women's sexual, social, political and economic repression. It cannot be a coincidence that pornography exists in a society where women are raped, beaten by husbands, pushed into low income work and generally not taken seriously.

It is a painful act of self-recognition of Christians, especially male Christians, that the Church has transmitted and shaped male domination in western culture. It is beyond doubt that the Church is part of the problem. But with God's grace, we may find courage to become part of the solution.
United Church of Canada, Toronto

5. The Link Between Pornography and Violence

One of the most controversial aspects of the public hearings was the conflict that arose over the link between pornography and violence against women. Those advocating the strengthening of government controls over pornography were convinced that psychological and sociological research had definitely established that such a link existed. Civil liberties groups and others who opposed controls were just as firmly convinced that no such link had been established. The Committee's conclusions on this issue are discussed elsewhere in the Report. This section will simply provide a sample of the views presented at the public hearings, with no comment as to their validity.

The Metro Toronto Task Force on Public Violence Against Women and Children provided a brief summary of the highlights of the research that has been done on pornography and violence.

1. Research in communications and psychology shows that the portrayal of violence in the media contributes to subsequent anti-social behaviour by its viewers. Scientists no longer question this effect; rather they now investigate to what degree anti-social behaviour is elicited, from whom, and under what conditions.
2. Research in experimental settings shows that the portrayal of sexual violence leads to subsequent violence against women. Under certain conditions of arousal, viewing sexual violence causes male subjects to be even more violent toward women than when they view non-sexual violence.
3. Research evidence is growing that so-called 'non-violent' or 'soft' pornography also causes males to behave aggressively toward women, although less intensely than the portrayal of violence alone or the portrayal of sexual violence.

> 4. While social science shows unequivocally that exposure to violent pornography is a *contributor* to sexual aggression and violence, the rules of scientific evidence make it difficult, if not impossible, to prove that it is the direct *cause* of such behaviour.
>
> However, as prominent scientists have noted, neither has the Surgeon General (in the United States) unequivocally proven that cigarette smoking is a direct cause of cancer in human beings. Both, however, have accumulated compelling evidence of causal links.
>
> These findings, and many related findings described in the literature, indicate ample justification for our society to quickly take steps toward the elimination of violent and aggressive pornography.
> *Metro Toronto Task Force on Public Violence Against Women and Children, Toronto*

Many groups provided the Committee with anecdotal evidence of the connection between pornography and violence in their own communities. The Ontario Advisory Council on the Status of Women included a compendium of anecdotal and circumstantial evidence linking pornography to actual crimes committed in North America. Le Regroupement Féministe Contre la Pornographie, in Montréal, described their work with battered women and reported that they are increasingly encountering women who have been forced to re-enact scenes from pornography consumed by their partners. The Canadian Federation of University Women in Toronto cited several Canadian murder cases in which there was said to be a connection between the murderer's actions and his use of pornography. A social worker, a member of La Fédération des Femmes du Québec, conseil Régional Saguenay, told the Committee that she frequently meets situations where women are required by their spouses to engage in unusual practices, to join in group sex and exchange partners, to engage in the sexual practices their spouses have seen on pornographic films in local bars, and to pose nude.

The Toronto Area Caucus of Women and the Law, like many other groups, cited studies by Professors Malamuth and Donnerstein to support their view that pornography encourages male violence against women by linking men's sexual arousal to violence and conditioning them to perceive violence as an essential component of sexual excitement; by showing violence against women as acceptable; by depicting women as enjoying violence against themselves.

Many took the view that while research linking pornography and violence is in its beginning stages, they personally do not want to wait for confirming evidence of the negative long-term effects of violent pornography. They believe that the probability of a strong link between violent pornographic videos and an increase in sexual offences must be taken seriously until proven false by statistical evidence.

They point out that pornography, like advertising, is a message with the aim of influencing behaviour. Since studies have already established that sexist advertising reinforces sexual stereotypes, pornography must have some influence on male behaviour.

> I compare pornography to racist films or literature: the medium does not cause misogyny in the case of pornography, nor racism in the case of racist material, but can serve to confirm these values, lend them legitimacy and encourage behaviour based on those values. From this confirmation, this legitimization, stems the harm.
> *Mayor Marion Dewar, Ottawa*

> Current scientific study (Malamuth and Check) has proven that in the laboratory setting there is no question that the sexual violence depicted in aggressive, violent pornography leads to aggression toward women. Specifically, there is considerable evidence showing that exposure to aggressive pornography dealing with rape produces a lessened sensitivity to rape, an increased acceptance of rape myths and *interpersonal* violence against women, as well as self-reported possibility of raping.
> *Canadian Coalition Against Media Pornography, Ottawa*

6. Municipal By-Laws and the Display of Pornography

Many groups described their efforts to persuade their municipalities to introduce or enforce by-laws to control the access of children to pornography. Major difficulties arose because of the vagueness of the federal legislation regarding obscenity and the enabling provincial legislation in some provinces, as well as the reluctance of local governments to act.

The recommendations made by most groups, including civil liberties associations, was that the display and sale of sexually explicit materials should be restricted to adults. Some suggested that all such magazines should be displayed behind opaque barriers at a height of 1.5 meters above the floor and that such publications should be sold in sealed plastic packages.

7. Film Classification and Censorship

Most groups favoured the continued provincial classification or censorship of all movies to be shown in public, although there was some criticism of particular provincial boards. There was also strong support for the proposal that provincial censor boards expand their duties to include the censorship of videotapes destined for private viewing.

> [This group] favours the establishment of a classification and labelling process of all video recordings, including a process of pre-screening by a permanent board and forfeiture of all material deemed illegal ....
> *People and Organizations in North Toronto, Toronto*

> [We] recommend that censor boards be given more adequate staff to cover the enormous volume of material being imported; have their mandates expanded to cover video cassettes, be they shown in public, rented or sold for private use; and similarly, be made responsible for the review of all television transmissions.
> *Roman Catholic Archdiocese of Toronto, Toronto*

> [NAC] cautiously advocates limited and clearly defined censorship and recognizes the need and difference between prior and post restraint measures.

> The attendant problems of the former can best be avoided by issuing clear and explicit guidelines and by the selection of Censor Board members who have a comprehensive awareness of the problems of violence against women ... Prior restraint [should] be used to eliminate only the most blatantly pornographic material and ... post restraint or the use of the Criminal Code provisions [should] be used to deal with material that either escapes the prior restraint process or which clearly exceeds the guidelines.
> *National Action Committee on the Status of Women, Toronto*

> The Manitoba government is now examining a host of reforms, including classification of videos for home use and regulating the use of satellite pornography in hotels and beverage rooms. However, without the suggested federal reforms, these initiatives cannot go ahead.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

8. Canada Customs

The inability of Canada Customs to prevent the importation of a great deal of the most violent pornography into Canada was strongly criticized in many briefs. Excerpts from the Ontario Advisory Council on the Status of Women brief summarized the major concerns.

1) Customs officials follow the same procedures as other law enforcement officials in focusing on sexual explicitness rather than violence or degradation. As a result, the more harmful types of pornography are allowed over the border.

2) Customs practices are not the same across Canada. The Joint Forces Project "P" in Toronto has found that British Columbia and Québec allow materials to cross their borders which would be prohibited in other provinces. The Attorneys General in the provinces set their own obscenity guidelines and standards and Customs officials tend to follow those guidelines. Once over the border the material can be freely transported across Canada.

3) The heavy volume of traffic at border crossings creates a situation in which only a comparatively small number of vehicles can be searched.

6) The federal guidelines for determining what is immoral or indecent are vague and decisions made by Customs officials are often subjective.

8) Legitimate movie houses are given 60 days to decide whether they can afford to make the cuts necessary to allow importation. During the 60 days that the film is in Canada thousands of copies can easily be made. The movie house may then take the *original* film back to Customs stating that it could not afford to make the cuts. The original film is then banned by Customs, but copies are not covered and would have to be found and seized.

The recommendations made by most groups focused on the need to: strengthen and standardize the Customs procedures; to train Customs officers and provide them with guidelines; and to eliminate the 60-day period apparently allowed in some Customs areas to importers of commercial films so that they can have the film reviewed and classified by provincial authorities.

9. Recommendations for Change

In summing up their recommendations for change, many witnesses emphasized that it was not only the actual laws that need to be changed, but the administration of the laws. Many believed that the proliferation of pornography is not unrelated to the fact that our society, including its entire justice system, is controlled by men.

> As it stands now, men make virtually every decision about what is and what is not obscene: at the source, in the conceptualization of sex roles by male producers of pornography; at the newsstand, the bookstore and box office, in the acceptance or rejection of pornographic materials for sale or purchase by predominantly male retailers and customers. Obscenity laws are written, argued and passed by legislatures comprised almost entirely of men ... The same laws are enforced at the borders by Customs inspectors who are almost invariably male, and in the community by police departments staffed overwhelmingly with men. Breaches of obscenity laws are prosecuted by male lawyers in courts presided over by a male judiciary. So called "expert" testimony is supplied, almost without exception, by male witnesses ....
>
> Furthermore, day-to-day coverage of the obscenity issue is directed by male publishers, editors, editorial writers and reporters, with the inevitable result that male sensibilities predominate, usually to the virtual exclusion of any comment at all by women.
> *Judith Dobie, Montréal*

The specific recommendations for change made by the majority of women's groups are similar in intent to those proposed by the National Action Committee on the Status of Women whose proposals are outlined below.

1) The present provision regarding 'obscenity' (Section 159, of the *Criminal Code*) should be repealed.

2) (a) A new offence, prohibiting the manufacture and distribution of pornographic material should be incorporated into the *Criminal Code*. This provision should not be located in the "Offences Tending to Corrupt Morals" section of the *Code*, but should either be in a new, independent section or be included in the section dealing with "Offences Against the Person" or under "Hate Propaganda".

Pornography should be defined as:

> any printed, visual, audio, or otherwise represented presentation, or part thereof, which seeks to sexually stimulate the viewer or consumer by the depiction of violence, including, but not limited to, the depiction of submission, coercion, lack of consent, or debasement of any human being.

For the purpose of this definition, the depiction of any person who is under the age of 16 or who is depicted as being under the age of 16 will be sufficient to deem the material pornographic.

(b) Wherever appropriate, the words "obscene" and "obscenity" should be deleted and replaced by the words "pornographic" and "pornography".

3) The *Customs Act* should be amended by removing the current prohibition against "material of an indecent or immoral nature" and replacing it with a prohibition against pornography, as defined in 2(a) above.

4) The *Broadcasting Act* should be amended to prohibit the broadcast of sexually abusive material, and such restrictions should apply to pay television.

5) The "Hate Propaganda" section of the *Criminal Code* should be amended to include sex as an "identifiable group". This section should be further amended by removing the necessity of the consent of the Attorney General before proceeding with an offence. [Some groups also suggested that the word "wilfully" should be deleted from Section 281.2(2)].

Suggestions made by other groups included:

1) The Solicitor General should instruct the RCMP and crown attorneys to keep records of the use of pornography in sex-related crimes, such as sexual assault, wife battering, incest and sexual murder.

2) Women should be given the civil right to sue producers of pornography for damages, as proposed in the Minneapolis by-law in the United States.

3) The guidelines on sex-role stereotyping, which were prepared for the Canadian Radio-Television and Telecommunications Commission, should be given the status of regulations and that licences for radio, television and pay television should be contingent upon adherence to these guidelines.

10. Organizations Opposed to Controls on Pornography

The opposition to controls, or to increased controls, on pornography, was made up of three distinct groups: first, civil liberties groups, some professional associations, and film and video organizations; second, periodical and video distributors and retailers; and third, gay rights organizations. Because their reasons for opposing controls were so different, each group will be treated separately.

10.1 Civil Liberties and Professional Associations

The right to freedom of expression and opposition to censorship were raised in briefs from the Canadian Association of University Teachers, from civil liberties associations and from film and video organizations.

> A great deal of literature from the ancient Greeks onward has as themes violence, horror and degradation. One only has to think of Oedipus Rex or of

> Titus Andronicus or indeed of many of Shakespeare's contemporaries ... or of any novelists or dramatists who have used war as a basic theme. Not only would the definition (as proposed in Bill C-21) place these works in jeopardy, it would also have a chilling effect on booksellers and publishers in Canada who may ... refuse to print, to sell or to distribute such books in order to avoid harassment.
> *Canadian Association of University Teachers, Ottawa*

The Canadian Civil Liberties Association pointed out in its brief that while it "has no hesitation in joining the National Action Committee on the Status of Women in an unequivocal denunciation of the 'new pornography'" it found it necessary to distinguish between moral condemnation and legal prohibition.

> The former is easy; the latter is fraught with difficulty ... How is the law to formulate a standard which will prohibit this vile pornography without simultaneously catching in the same net a lot of other material which it would be unconscionable to suppress?
> *Canadian Civil Liberties Association, Ottawa*

The Civil Liberties Association points out that in several obscenity cases tried under present provisions of the *Criminal Code*, neither trial judges, appeal court judges nor Supreme Court judges were able to agree on whether books such as *Lady Chatterly's Lover* and *Fanny Hill* were obscene. The vagueness and subjectivity of the present law, the Association said, leaves publishers, film makers, authors and booksellers in a state of constant insecurity as to whether they are in compliance with obscenity laws. They conclude that while "one flawed definition does not invalidate the concept of legal prohibition ... there is reason to fear that dangerous imprecision is inherent in the very exercise of attempting to define pornography."

The Association concedes that the definition of pornography proposed by the National Action Committee on the Status of Women "creates fewer dangers than the one proposed by the government [because] it attempts to narrow the subject matter to the issue of coercive sex." However they conclude, after examining the danger posed by pornography, that:

> ... the evidence fails to demonstrate a direct causal link between exposure to pornography and the serious abuse of women and children. We are aware, of course, of the reports that on a number of occasions, those who have violated women and children were found with pornography in their possession. What is not known, however, is whether the pornography produced the violence or whether those violence-prone people were attracted to pornography. Moreover, there has been no adequate measure of the number of people, otherwise violence-prone, whose aggressive impulses may have been moderated by sublimation through pornography.

The Civil Liberties Association concludes that:

> ... the present obscenity sections of the Criminal Code should be repealed. Moreover, it is crucial that they not be replaced by anything broader. The ... recommendations of NAC ... represent welcome steps in the right direction. But ... even they are likely to incur excessive risks.

The Association is firm in its opposition to censorship of any material involving *simulated* sexual abuse, but concedes that in the case of pornography which involves the actual abuse of real people "there is an arguable case for legal prohibition against the resulting film or literature."

Civil liberties associations in several cities gave their qualified support to municipal regulations designed to keep pornography out of the sight and reach of children.

The B.C. Civil Liberties Association explained the rationale behind their acceptance of regulation.

> Regulating a forum is not inconsistent with the maintenance of its freedom. We have an obvious and legitimate interest in protecting the young from forms of expression that we regard as possibly harmful to them. We also have an interest in protecting citizens from effrontery when we can provide that protection without materially limiting access to media on the part of persons who wish to see or hear them. Our association approves of those regulations which impose formal constraints upon those who distribute and sell pornographic materials to do so with that measure of discretion which provides for these two legitimate social interests. It is appropriate, for instance, for the Director of Film Classification to provide movie patrons with advice concerning the presence of possibly disturbing material. Similarly, we do not object to requiring magazine merchants to withhold from public view those of their wares of which the covers could disturb children or affront innocent adults.
> *B.C. Civil Liberties Association, Vancouver*

The Canadian Association also agrees that pay TV stations should comply with certain standards regarding the material they are to carry.

> Where facilities are at a premium, there is a strong argument for some kind of regulations over the mix of things which can be shown, whether it is sexual, religious, nationalistic, or athletic. ... the articulation of the standards is a contentious exercise ... [but it] is not as contentious in the context of granting special licences as it is in the context of restricting general freedoms.

Another organization which expressed strong opposition to censorship of any kind was the Ontario Film and Video Appreciation Society (OFAVAS) which has been involved for two years in court actions against the Ontario Board of Censors (now the Ontario Film Review Board). Their allegation that the Board contravenes the *Charter of Rights and Freedoms* was upheld by the Ontario Court of Appeal with the result that the Ontario government was forced to bring in specific legislation setting out the powers of the Censor Board.

OFAVAS, a group of filmmakers, writers, journalists, artists, performers and others, outlined their reasons for opposing censorship.

> As people involved for the most part in creative fields, we use words and images as the tools of our work. Our creative use of these tools permits us to develop insight for ourselves and others into the nature of the world around us. We fear that if we cannot broach certain subjects or use particular images or words or ideas, that our effectiveness in giving expression to the complex range of human experience will be severely curtailed. We find it short-sighted

> and untenable that a government-appointed board is permitted to interpret the meaning of images and ideas on behalf of everyone else in this society. It is gross interference in our work, and something that we feel is intolerable in a democratic society.
> *Ontario Film and Video Appreciation Society, Toronto*

The Society also pointed out that as a group which supports feminist goals, they believe that social change is essential in order to improve the lot of women. However, they believe that censorship of pornography is an ineffective solution to the problems of discrimination against women.

> We are aware of the negative image of women that pornography presents. We share the revulsion of many over commercial exploitation of people in pornographic material. However, we do not believe that pornography is the root cause of sexism in society: to the best of anyone's knowledge, a subordinate station in life has been the lot of women in most societies throughout history. We see censorship as a placebo measure that does nothing about the real problems that discrimination causes, and which, in fact, distracts from giving those problems the attention they deserve and require. Furthermore, the very real danger exists that censorship, perhaps even inadvertently, will serve to silence the very voices that could raise awareness toward social change.
> *Ontario Film and Video Appreciation Society*

The Society then goes on to explain why it disagrees with the feminist view regarding violent pornography.

> The feminist perspective that has gained wide acceptance and momentum has shifted emphasis away from graphic sexuality to questions of violence and power. This approach, however, implicates a whole range of imagery, from news, sportscasts and documentaries to narrative films like Westerns and horror movies. From our standpoint, it makes more sense to challenge overtly sexist behaviour and the discrimination and hatred behind that behaviour. But if we look for images that show women in a way that could be seen as sexist, it becomes very difficult to define the pornographic. Everything from fashion magazines to the paintings of the old masters could conceivably be seen to be in this category. Our fear, of course, is that if it is so difficult to define pornography, it is inevitable that attempts to define it in law for the purpose of censoring it will affect other areas such as social comment and artistic expression.

OFAVAS agrees that sexism and violence cannot be tolerated, and explains why censorship is not the answer.

> But simply curtailing representations of these acts will not stop them from happening. It may even prevent people from discussing and understanding them. Censorship, by simply eliminating "objectionable" images, undermines public challenge and debate over the values which motivated their production. It attacks the symptoms, not the root cause. It is sex discrimination and hatred in the real world that hurts people and that must be stopped.

The solutions recommended by the Society include: a classification system which could be used to inform the public of the nature of material that might be harmful to minors or offensive to some adults; height and placement restrictions for magazines displayed in stores; and adult-only bookstores, if necessary.

It also makes recommendations designed to correct the present sexual inequality in the broadcast and film industry.

> We urge the Committee to recommend and support all affirmative action programs with respect to the training and hiring of women in both the broadcast and film industries. We recommend that the Committee stress to these industries the basic inequality present in a system of production which is dominated by a single gender of our population.
>
> We support the recommendations of the *Report of the Task Force on Sex-Role Stereotyping in the Broadcast Media*, ("Images of Women," CRTC, 1982), which calls for specific programming and media created and administered by women.
> *Ontario Film and Video Appreciation Society, Toronto*

10.2 Periodical and Video Distributors and Retailers

The views of distributors and retailers of periodicals and videotapes were presented to the Committee by the Periodical Distributors of Canada, Ottawa, and the Video Retailers Association of Canada Inc., Toronto, as well as a few individual retailers.

The Periodical Distributors, founded in 1942, said that it represented 37 Canadian-owned or controlled companies which distribute approximately 85 per cent of the magazines and paper back books sold in 12,000 local newsstands throughout Canada. They estimated that their sales are approximately $200 million annually.

In their brief, the distributors outlined their views on what Canadians would consider pornographic and denied any involvement in distributing such material.

> ... most Canadians would describe as pornographic, such hard-core material as that depicting, in an objectionable and most offensive manner, extremes of sexual behaviour, especially within the context of violence and forced submission of women.
>
> While PDC members cannot assume responsibility for everything which may be offered for sale at retail outlets, we can assure the Special Committee that we do not knowingly handle material which is obscene or, by any reasonable standard, pornographic. PDC members have exercised particular concern over the possible presence in the mass market of material which may be exploitative of sex and violence in combination. We believe that "violent pornography" is extremely rare on Canadian newsstands, and that what may exist, is not there as a result of having been distributed by PDC members.
> *Periodical Distributors of Canada, Ottawa*

The Video Retailers Association pointed out that the great majority of their retailers are business people anxious to maintain their reputation within their community. They agreed that the undue exploitation of violence, cruelty and sex should not be acceptable, but that their problem is in trying to define what is "undue." They stated that no one, not the police, the retailers' lawyers, the provincial boards of film censors or Canada Customs will provide guidance on what they can legally distribute.

They urged that standards should be established that would: be tolerable to the public; be clear and helpful to business and to law enforcement; be acceptable to private consumers; and be constitutionally workable.

10.3 Gay Rights Organizations

Several gay rights organizations presented briefs which emphasized that gay pornography is quite different from heterosexual pornography.

> Heterosexual pornography is often said to victimize women as a gender group, women depicted as submissive and passive receptacles of violence by male producers for male consumers. The same cannot be said of homosexual male pornography, however, in which gay male producers, models, and consumers all come from the same gender group and cultural community.
>
> The heterosexual male consumer, by virtue of his gender and place within patriarchal power relations, is automatically constrained to look at a woman in a sexual representation in terms of "otherness" and imposed objectification. In contrast, the homosexual male consumer, looking at gay sexual depictions, is offered a range of identification choices determined not by his gender but by his individual cultural and erotic predispositions. The argument that women as a group are victimized by heterosexual pornography has no equivalent argument with relation to gay pornography: in this sense, gay pornography is primarily a "victimless cultural phenomenon."
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers provided an analysis of the difficulties faced by gays as a minority group in a predominantly heterosexual society.

> Culture is the texture of people's lives, the way a community communicates with itself and the outside world. The state should encourage and protect community cultures not suppress them. State suppression cannot erase a culture, only change its form, drive it underground or distort its language.
>
> As a minority characterized by its sexual orientation and sexual practices, the gay community has always had a flourishing tradition of erotic culture. Whether or not this has been underground or above-ground, written or oral, professional, ... or amateur, has depended on historical factors such as the tolerance of the state, the vigour of police persecution, and the degree of organization or concentration of the gay community.
>
> All gay culture, not only gay erotica, is stigmatized by the heterosexist mainstream as pornography and obscenity. Obscenity statutes have traditionally been an important means by which the state, the Church, and the police attempt to destroy our culture, in the Canadian context as in many others. Since the so-called decriminalization of sodomy by the 1969 Omnibus Bill, and since the emergence of above-ground gay communities in every Canadian city about the same time, this campaign against gay culture by means of obscenity statutes has not disappeared. On the contrary, it has ballooned, ...
>
> For centuries gay culture remained invisible, covert or underground ....
>
> Since the mid sixties our culture has emerged above ground. There exists across Canada a flourishing fabric of gay culture, all including an important erotic component: literature, bookstores, cinema, visual and performing arts, journalism and media ....

> Over the last fifteen years, the mass-produced erotic magazines have not been the only targets of the police (through enforcement of obscenity statutes, and through extra-legal harassment and prior censorship, Customs officials exercising censorship through highly subjective and undefined criteria), and other censorship bodies both official and unofficial. In fact, the more frequent targets of such attacks have been "legitimate" cultural manifestations, within all the categories listed above. The obscenity statutes permit not only the prosecution of our cultural products, including non-erotic print journalism, but create an atmosphere in which the equally dangerous unofficial and regulatory (non-criminal) censorship is encouraged, whether by provincial theatre boards, marauding morality squads, biased Customs officials, crusading private citizens, or puritanical television networks.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The major difficulty with the present obscenity sections of the *Criminal Code*, as far as the gay community is concerned, is the fact that the decision as to what is obscene is made by a judge, based upon "national community standards", and on the assumption that the judge knows what these standards are.

There are four problems with this:

1) Canada is made up of many diverse ethnic and cultural groups. A set national community does not exist.
2) Judges in Canada are appointed. They are not elected from a community to represent that community.
3) Though a gay community definitely exists, it is not limited to one geographic area. It is dispersed throughout a large country in which many community standards exist.
4) No judges are known to be openly gay.

> To have a judge rule over what is degrading and horrifying to a community of which he or she probably has very little understanding and insight is to leave that community very vulnerable .... The existing obscenity laws, ... have been used against the gay community. The proposed changes to the law [Bill C-19 of 1983] make it all the more dysfunctional and thus a much more powerful tool for abuse.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Gay Cultural Workers point out that if community standards are to continue to be the final test of what is obscene, the gay community should be allowed to define the standards for its own community.

> It must be remembered that commercial explicit depiction of homosexual practices are aimed at gays. For the most part, prurient heterosexuals will only see these materials if they make a conscious effort to seek them. For the majority, no matter how large, to decide what materials a minority sees and hears, especially when that material has not been proven to be harmful in any way to the majority, goes against the democratic tradition.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

The Committee was also urged to explore the idea of extending the hate literature sections of the *Criminal Code* to protect sexual minorities as well as visible minorities and women.

> Many elements within the gay community would welcome legal redress against the frequently vicious homophobic components of mainstream culture and the media (for example the film *Cruising* which many of us felt to be advocating violence against us in an explicit and degrading way) or against more obvious forms of hate literature such as the anti-gay pamphlet campaign that affected the 1980 Toronto municipal elections through lies and smears.
> *Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal*

Most gay groups called for the repeal of present obscenity legislation, some arguing against censorship of any kind, and others suggesting that a new section of the *Criminal Code* should be developed to deal specifically with pornography on the basis of sexual violence and not on the basis of sexual explicitness.

11. Conclusion

The public hearings were an important aspect of the work of the Special Committee. The well-researched briefs, presented by groups and individuals in every region of Canada and representing a wide diversity of opinion, were an invaluable contribution to the body of information collected by the Committee. We thank all of the participants who devoted many hours of their time for their help in the attempt to find acceptable solutions to the problems involved in pornography in Canada.

Chapter 6

Pornography in Canada Today

1. Introduction

As will be apparent from the preceding chapter, virtually everyone who appeared before the Committee or made a representation to it, had very strong views about pornography. While the majority of those making presentations found pornography to be too widely available, especially with respect to children, and the content of pornography to be abhorrent and despicable, there was a strong minority opinion stating that as awful as some of the pornography is, any moves by the state to ban or control access to the material would have worse consequences than the material itself being easily available.

The issues which were raised at the public hearings can be divided into three general areas: the increased availability of pornographic material; following from this, the implied increase in the number of people who are exposed, willingly or unwillingly, to such material; and thirdly, the harms to individuals and society as a consequence of the first two factors.

Those making representations to the Committee used a variety of sources of information to substantiate their arguments. Some groups had conducted their own surveys in their communities to see what sorts of materials were available and where; others reported on crimes or unacceptable forms of behaviour which appeared to be connected to the use of pornography. In addition, many people made reference to studies conducted by academic researchers which, they argued, supported the views and conclusions they had reached.

In this chapter we will analyze in some detail the evidence bearing on the three issues described above. The question of evidence is an important one. Canadians who wish to see more stringent controls on pornographic material, support this course of action because of the harms they see deriving from the widespread availability of pornography. Groups who are, in general, philosophically opposed to control and censorship, also indicated that controls would be acceptable to them if indeed significant harms were shown to result from use of such materials. Support for certain lines of action are, therefore, contingent on the strength of the arguments about increased availability, increased use and resulting harms.

In order to assist the Committee in its efforts to understand the current situation with respect to the availability and use of pornography in Canada today, the Department of Justice commissioned a number of studies on pornography. The studies fall into four general categories: 1) comparative studies, 2) specific issues within Canada, 3) a National Population Study, and 4) a review of the recent research.

The comparative studies involved an analysis of legislation and control practices in the United States, the United Kingdom, selected European and Commonwealth countries and other jurisdictions thought to be of interest.[1] The research was generally undertaken in conjunction with work on prostitution laws. Information was taken from published sources, interviews with selected officials, if possible, and reports on public attitudes towards the issues.

Within Canada, four empirical studies were commissioned on specific issues: provincial film censor boards,[2] the production of pornography in Canada,[3] a content analysis of triple x and adult videos[4] and an analysis of how selected newspapers covered pornography as an issue.[5]

In addition to these studies, a major element in the research was a National Population Study conducted in June and July, 1984.[6] A sample of 2,018 Canadians, representative of all parts of the country except the Yukon and Northwest Territories, answered questions about the availability of pornography in their communities, their use of such material and their preferences about whether or how the material should be controlled. Although it is difficult to study such complex issues as obscenity and its control in the relatively short time given to survey interviews, the results present some interesting information on Canadian views. As the first such large-scale project in Canada, however, the survey was something of a learning experience for all concerned. Because of this, not all the issues included in the survey were as well addressed as one would wish. The results should, therefore, be seen as one contribution to an understanding of these issues, and not a definitive statement on the topic.

The final project in the Department of Justice's research program was a review of the research literature from 1975 onwards.[7] The review examines the impact of pornography as presented by researchers in sociology, psychology, social psychology, criminology or related fields. Over 450 citations were examined and reported on. This review is very comprehensive and proved invaluable in assisting the Committee to gain an overview of all of the more current research in the area.

Although the Department of Justice's research has provided the Committee with most of its empirical information on pornography, the Committee itself was involved in the gathering of information other than through the public hearings. This information was typically collected through meetings and interviews with officials in various government departments and agencies, for example, Customs and Excise, the Royal Canadian Mounted Police, the Canadian Radio-Television and Telecommunications Commission

(C.R.T.C.), the Post Office, Department of Communications, and provincial film censorship or classification boards. Information from these sources has supplemented and complemented that gained through other means, and has been of significant help to the Committee.

The task of assimilating all the information presented to the Committee has not been an easy one. In the following discussion, however, we present what we believe to be the current situation in Canada with respect to pornography, its availability, use and harms.

2. The Availability of Pornographic Materials

When we consider pornographic material in Canada, we are dealing almost exclusively with material that is imported into the country, rather than material which is produced here. From the information we have it appears that a very small number of pornographic films are produced within Canada but that the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes. The only obvious exception to this would be live shows in theatres and bars. Pornographic material coming into the country comes overwhelmingly from the United States. This is the case whether the material is magazines, films or videos. The only other identifiable source of material is European countries, but their contribution to the total volume is very much less than that of the United States. Importation of material and the role of the Customs and Excise and the R.C.M.P. in this regard is discussed in Section II of this Part.

Most people at the public hearings felt there to be an overwhelming pervasiveness of pornography in our society. We made our own attempts to discover what we could about the availability of pornography, rather than relying on these impressions, however forceful they may have been. We will document the basis of the Committee's conclusions on this issue, and in doing so, indicate the areas where our information is not nearly so clear or substantial as one would wish. While we conclude that there can be no doubt that in virtually all parts of the country, pornographic materials are indeed more widely available in 1985 than they were 15 years ago, this conclusion depends not on concise and comprehensive statistics, but on the piecing together of some statistics with indications, trends and general observations.

Research documenting the increased availability of pornography has become a matter of interest only recently. Indeed, until the completion of the research undertaken by the Committee on Sexual Offences against Children and Youths (Badgley Committee)[8] and the Department of Justice in support of our Committee, very little was known about the availability of pornography beyond the personal and anecdotal accounts of people concerned with the issue. The Report on Obscenity and Film Censorship (the Williams Report)[9] from the United Kingdom, points to a similar difficulty in documenting actual increases in the availability of pornographic materials, as do several studies from the United States.[10] It must be remembered, however, that some of the work in the United Kingdom and the United States was completed before the introduction of pay television or the sudden explosion in the home ownership of video cassette recorders (VCRs).

Anecdotal accounts are, of course, an important source of information. They are, by no means, to be dismissed because they do not meet the current canons of social science research. Frequently, however, more information is required in order to be sure that one is not dealing with a highly aberrant situation. Nevertheless, it would be difficult to argue against the logic of the position that says that if some television stations are advertising adult entertainment and blue movies, and if films are now available on videotapes as well as in the theatres, pornography has indeed become increasingly available.

As indicated by the research conducted for the Badgley Committee, part of this increased accessibility occurs because more stores, and a wider range of stores, carry pornographic magazines and publications than previously.[11] Until relatively recently, pornographic materials were confined to a few stores in any city which were "known" to specialize in such materials. Now, a full range of the material is available in virtually any store which sells magazines. These include the thousands of corner or convenience stores used by people, including children, on a regular and frequent basis. Pornography is also more accessible in that it is not confined now to printed matter and films which can been seen only in theatres. Instead pornography is on television, particularly pay television, with the potential of being seen in virtually every home across the country. Where pay television is not accessible, the films can be seen on videotapes. Satellite transmission of signals is also starting to play a role in the distribution or pornography.

We know also that the print media and adult magazines are readily accessible not only to adults, but also to children, in every region. In the majority of instances, stores which sell adult magazines make no effort to segregate them from any other type of material. Although pornographic magazines are available throughout the country, there are some regional variations. Thus, the western provinces appear to have more of such material than do the eastern ones, with the exception of Québec. Québec is most like British Columbia in terms of the pornography available in its stores, leading to the conclusion that these two provinces are the most permissive with respect to sexually explicit material.

The information reported by the Badgley Committee is confirmed by the information from the National Population Study, in that 73% of the respondents were aware that adult magazines, movies and videos were available in their communities. Close to three-quarters of those participating in the survey concluded that pornography is easily available to anyone who wishes to see it.[12]

With respect to magazines, therefore, we are on firm ground in asserting that such magazines are more accessible than before, and that there has been a substantial increase in their sales over the past 16 years or so. The Badgley

Committee has the most comprehensive and extensive research to date on the availability and circulation of pornographic magazines in Canada.[13] They report that the circulation figures for 17 different magazines for the period 1965-1981 are 3.5 times higher per capita in 1981 than they were in 1965. In 1981 each Canadian bought 0.556 magazines, compared to 0.183 in 1965, with males, in particular, increasing their consumption from 0.364 magazines in 1965 to 1.121 in 1981.

It is undoubtedly the case that the increased availability of pornography, particularly of magazines, is related in part to an increase in the production of such magazines and their importation into Canada. By the 1980s the number of different titles had risen to 540, representing a sharp increase over the past 20 years. While it should be noted that many of these magazines publish only one issue so that the great increase in titles cannot necessarily be equated to an equally overwhelming increase in materials, the general conclusion has to be that more pornographic magazines are now being published than previously.

All the evidence which the Committee has considered leads to the conclusion we stated above that pornography is far more available today than it was 10 or 15 years ago. This availability results from the use of all forms of media, from an increased production in some forms, if not all, and from a distribution network that has increased significantly in size to take in a far wider variety of outlets than previously. Pornography is certainly part of the content of every form of the media and is easily available in every part of the country.

3. The Use of Pornography

The question of whether more people are actually using pornography is not, however, so easily answered. We lack consumer information from previous years, and are not able to make the necessary comparisons between the numbers of people who bought or saw pornography then and those who do so now. Circulation figures for magazines have clearly increased but this does not necessarily mean that more people are buying the magazines. Instead, it could mean that the same number of people who bought magazines in 1965, for instance, are now buying more because there is a greater variety of material available. Accordingly we must ask whether the increased availability of magazines results in a broader dissemination or in a greater concentration in use of the materials.

The information we have does not allow us to give an unequivocal answer to that question. Both trends seem to be occurring but we cannot be precise about the extent of either. The significance of the inquiry about consumption lies in people's theories about why pornography is harmful. The concerns we heard most often at the public hearings were that, for adults, exposure to or use of pornography beyond a certain point was harmful to the individual, groups in society and society as a whole. Implicit in the argument is that the amount of material which a person sees is a relevant consideration in determining whether harm takes place. It is thought unlikely that an adult looking at one pornographic magazine or video would be harmed irretrievably, whereas, an adult, seeing this material to the virtual exclusion of all other forms of entertainment will develop a corrupted view of human relations. Somewhere between these two extremes, it is assumed that the average Canadian is likely to be harmed when the quantity of material used crosses the threshold between not being harmful and being harmful. The amount of material used is, therefore, crucial to the debate over whether a person is harmed by the material and may then go on to harm others.

There is also a view that a large number of people will be adversely affected by pornography that is pervasive. This argument focuses not on the heavy use of pornography by a few, but rather on use, beyond an acceptable level, by a large number of people. The effects of this pervasiveness theory are twofold. On the one hand, it is argued that the users themselves will be harmed because they acquire from pornography a distorted view. On the other hand, it is argued that harm will be suffered by the group that is portrayed in the material. Generalization of these portrayals throughout society will cause others to think of all members of the group in the way they think of those portrayed.

These different theories about the harms of pornography give rise to different suggestions about how best to deal with it. Thus, the Committee has had to contend with these different theories, as well with the related problem of what it is that people are actually seeing.

From the National Population Survey we know that 11% of Canadians over 18 years old (somewhat over two million individuals), bought at least one "adult entertainment magazine" in the preceding 12 months, i.e., sometime between June/July 1983 and June/July 1984. Men outnumber women buyers by a ratio of 3:1. A further 32%, or nearly 6 million individuals, did not buy a magazine but did leaf through or read one at least once during the previous year, with men again being far more likely to do so than women.

Apart from revealing that the consumer is likely to be male, the survey data indicated that the consumer has a number of characteristics which differentiate him from the non-consumer, although it is difficult to interpret why certain attributes might lead a person to buy magazines of this kind. All we can say at this stage is that those with less than eight years of education buy fewer magazines than those with more education; the unemployed are over-represented among those who buy the magazines; there is a tendency for young people to outnumber older buyers, for the single to outnumber the married and for consumers to come from Ontario and the West rather than Québec and the Atlantic region.[14] Clearly we need considerably more research before we can be confident in talking about the buyers of such magazines. Such research must address questions like why people buy these magazines, whether they buy only one or several, for how many years they buy them, and a whole host of similar questions relating to consumer motivation and behaviour.

The usage statistics of adult-only videotapes are virtually identical with those relating to the use of adult entertainment magazines, according to the National Population Study. Twelve percent of Canadians had bought or rented such videotapes in the previous year.

Although magazines and videos are often cited as the media which people use if they are seeking pornography, in fact most Canadians see on television what the National Population Study termed "adult entertainment". Of the respondents to that survey, 57 percent said they had seen television programs showing nude adults at least once during the previous 12 months, 43% had seen programs containing scenes of heterosexual intercourse, 57% sex combined with violence and 67% sexual activity between people of the same sex.

While these data indicate the wide use of adult entertainment, caution is necessary in their interpretation. As will have been evident from the way in which the results have been presented, the survey dealt with what was termed "adult entertainment" and not pornography. Adult entertainment is probably a broader term than pornography in the minds of most people, and as we have outlined in a previous chapter, pornography itself has many connotations in everyday usage. The terminology used in the National Population Study, then, means that we cannot conclude from the survey anything about the use of the sort of pornography featuring images of perversion or degradation, in comparison with other categories of adult material. Indeed, it may well be the case that some of the material within the category of "adult entertainment", while being inappropriate for children, could actually be considered erotica because it does not demean the nature of sexuality.

The only indication we have of the sort of material the respondents had in mind when answering the questions is in relation to magazines. As is confirmed from circulation figures, *Penthouse* and *Playboy* are the magazines bought most often, by 39% and 30% respectively of the respondents, followed by *Playgirl* (8%) *Hustler (6%)*, then a whole variety of other magazines (7%). *Playboy* is read or leafed though by 38% of respondents, *Penthouse* by 23%, *Hustler* by 7%, *Playgirl* by 6%, and other magazines by 7%. These figures illustrate the overwhelming significance of *Penthouse* and *Playboy*. Whether or not one considers their content acceptable they are certainly the ones that most people see.

Although we can gain some indication of the total number of people who have been exposed to adult entertainment from the National Population Study and magazine circulation figures, we still do not have much information about actual patterns of consumption. We do not know, for example, the extent to which the same individuals buy the different magazines, producing a high concentration of usage rather than a widely dispersed but less intense exposure. For instance, the Badgley Report confirms that *Penthouse* and *Playboy* are the best selling magazines in Canada with monthly sales of 500,000 and 300,000 respectively. But we do not know whether 800,000 different Canadians each buy a copy of these magazines, or whether 300,000 of the half million people who buy *Penthouse* also buy *Playboy*, or the exact extent of the overlap between buyers of one pornographic magazine and the buyers of another.

Nor are we very informed about the frequency with which individuals buy pornography. The survey figures indicate the numbers who have bought at least one magazine in the past 12 months but do not inform us of the numbers who buy such material every week or every month. Similarly, circulation figures such as those included in the Badgley Report tell us how many magazines are being bought in a month but not whether the same or different people buy them each month.

If one looks for information on the overlap between magazine users and users of other forms of the media, the only data available are from the National Population Study. While the figures reflect the influence of television, there is some overlap in the use of the different media. It is also noticeable that while nearly a third of the respondents use or see no adult entertainment material at all, two thirds do use or see such material. (See Table 1)[15]

Table 1
Use of Adult Entertainment Magazines,
Videos, and/or Television

Material Used	Percentage
None	31.5
Magazines only	6.8
Videos only	1.2
Television only	30.6
Videos & Magazines	1.4
Videos & Television	3.0
Magazines & Television	16.7
Videos, Magazines & Television	5.7
No Answer	3.1
TOTAL	100.0

The wide dissemination and viewing of sexually explicit material thus appears to be a well-established fact. Because of the terminology used in the National Population Study, we do not know whether all of this material would be pornographic in the way we have described that term in chapter 1 of this Section. Certainly we have received complaints during the public hearings about the content of *Playboy* and *Penthouse*. Similarly, we cannot answer whether the viewing of such material has reached a level which could be considered detrimental to either the general population or specific groups of individuals. The answers to these questions rest in part on our understanding of how pornography affects people, a topic which will be discussed later in this chapter. Before doing so, however, we must give further consideration to the content of the material being seen.

4. The Content of Pornography

The question most closely tied to the issue of who is consuming pornographic material is the question of exactly what it is they are seeing. That is, what is the actual content of the depictions or texts? This issue is of central concern in any debate about the value or harm to be attached to pornography. Again, however, the research literature is disappointing.[16]

Generally, studies have been confined to a limited number or type of magazines, and to short time periods in terms of comparison. As with other research on pornography, what is termed pornography can vary considerably from one study to another. It is also significant to note that given the importance of television as a source of adult entertainment, studies of the content of television programs available in Canada, and in particular, longitudinal studies which could document any change in content, are rare.

The research which has been conducted on magazines and videos does not confirm the overwhelmingly awful picture presented by some groups and individuals in their briefs to the Committee. We recognize, of course, that for some people, any film or magazine with a theme of sexual violence is one too many. But the view that large amounts of violent pornography or child pornography are being consumed is not substantiated by the research. Again, one can well argue that the pornography which is available does indeed portray women as degraded, sexual objects and that this is as harmful as portrayals of sexual violence. But, the idea that a great deal of the pornography has taken on the worst possible characteristics of the genre is unconfirmed at this time.

The Badgley Report, in a content analysis of the texts and pictorials of 11 popular adult magazines which were published in June, 1983,[17] stated that most of the depictions are of totally or partially unclothed women in positions which expose their genitalia. Violent images and themes were found in 1.3% of the pictorials and 4.1% of the texts. Children were not depicted in the pictorials but were part of the texts (4%) and of the advertisements (10%). Clearly, violent and child pornography is present but is not an overwhelming theme in these magazines.

It should, perhaps, be no surprise that the content of pornographic magazines changes as does the content of other media. What is difficult to know, however, is what pornography is changing from and to what. Again, we have to conclude that at this time we simply do not know.

The study which is most widely cited in support of the view that there is increasing violence in pornography is that conducted by Malamuth and Spinner.[18] These researchers analyzed the pictorials and cartoons of *Playboy* and *Penthouse* from June 1973 to December 1977. They found that violent images had increased, but that they did not in any event exceed 10% of all cartoons and 5% of photographs and drawings. The change in content that Malamuth and Spinner reported is both minimal and marginal and could be accounted for by many other variables than simply an escalation in the violent content of the magazines. Again, the research does not lead us to any firm conclusions on the trends in the material.

Consider, also for example, some of the changes in content which may not be related to questions of violence. A 1982 study by Dietz[19] of 1,760 heterosexual pornographic magazine cover photographs stated that in 1970, lone women were the subjects of the majority of cover pictures whereas by 1981, this was the case for only 10.7%. Apart from the 1981 covers which could be said to display normal heterosexual relations between one woman and one man (57.9%), 17.2% portrayed scenes of bondage and domination (perhaps evidence of increased violence although sado-masochism is not necessarily exploitative), 9.8% group scenes and 4.4% transvestism or transsexualism.

What such changes in content indicate is difficult to interpret. The disappearance of lone women from pornographic magazine covers might be a positive development if it is interpreted as an indication that women are coming to be seen not just as sexual objects to be observed. There is some sense of context in that other people are included. On the other hand, the increased representation of the more extreme forms of sexual behaviour is not reassuring. Similarly, the notion that pornographic comics portray women as having the same sexual desires as men, could be regarded as positive by some who see it as an egalitarian approach.[20] Others, however, would argue that this denies the real nature of women's sexuality, particularly where depictions of male sexuality stress impersonality or aggression.

The one other area where we have some information with respect to content is video-cassettes. A study conducted for the Department of Justice in the lower mainland of British Columbia analyzed 150 videos, 58 rated as adult, restricted or x rated by the stores from which they were rented and 92 triple x rated.[21] This area of British Columbia has achieved a reputation as a major source of pornographic material and as an area where the more extreme varieties of sexually explicit material are available. It was believed, therefore, that in studying videos available in the lower mainland, some of the most extreme material available in Canada would be analyzed.

It was assumed that the "adult" videos would be less explicit and extreme in terms of their depiction of sexual and violent activities than the triple x videos. Having completed their analysis of the videos, however, the researchers conclude that the basis of the distinction between adult and triple x videos is not particularly clear. The 150 videos contained 4,203 separate scenes. An analysis of the scenes resulted in 50% (2,101) being excluded from further consideration because they did not include any sex, aggression and/or sexual aggression. Of the 2,102 scenes which did contain these elements, the following distribution was found:

Table 2

Classification of Video Scenes by Content

Scene	% of scenes coded	% of all scenes
Sex	77.4	38.7
Aggression	18.7	9.4
Sexual Aggression	12.7	6.3
Other	—	50.0
N	(2,102)	(2,101)

(Note: the scenes total more than 100% because some scenes contained more than one element.)

While adult videos could be considered less extreme in that they contained fewer scenes involving sex, aggression or sexual aggression than did triple x videos, there was a clear increase over time in the depiction of sex scenes in the adult category. The triple x videos contained more sex scenes than the adult videos, although the number of these scenes decreased over time. The triple x videos also contained sex scenes that were considerably more positive than the scenes in the adult videos. That is, the participants were there by mutual consent and appeared to be enjoying the activity. This latter finding was contrary to the expectation that the triple x videos would contain the most dehumanized depictions of human behaviour.

Distinctions between the two types of videos are consequently difficult to make. While both types of videos do contain scenes of sexual aggression, violence and domination are not predominant themes. Rather, mechanical sexual relations, i.e. an absence of affection, love or passion and a concentration on the pure mechanics of sex between two adults of the opposite sex were by far the most common portrayals. None of the films involved children and only one percent and two percent of the adult and triple x films respectively involved those who were apparently teenagers. Further, the adult videos contained more scenes of aggression and particularly physical aggression than the triple x.

The incompleteness of the available research makes it difficult to reach any conclusions about the content of pornographic material. Certainly, there are depictions which the vast majority of Canadians would find completely unacceptable. These depictions appear, however, to be in a minority. About the majority of the depictions, there would be much more debate. The trends in the content of pornographic material are also hard to detect and equally difficult to interpret. The material is changing, but whether for the better or the worse is, as we have remarked, a matter of judgment.

5. Pornography and Harms

The concerns about the increased availability of pornography, its use by a wider range of people and the nature of current pornographic material, come together at the point of discussing the impact or harms that may be associated with pornography.

The debate about the harmful consequences of pornography is perhaps one of the most contentious and difficult debates of our time.[22] People hold very strong views about the harm that pornography causes. They argue that pornography is to be deplored simply for portraying people in an inhuman way or because it invites consumers of pornography to imitate the inhuman behaviour portrayed. In the latter instance, it is argued, non-consumers of pornography, especially women and children, are often victims of the consumers who want to act out the fantasies they see in pornographic material. Further, the argument runs, we are all victimized to the extent that a society which condones the portrayal of people in such degrading and inhuman ways is a society whose values are, at the very least, questionable. The exploitation of one group of people for the gratification and entertainment of another and for the gratification of the more extreme sexual desires of men is surely not consistent with the type or quality of society we would like to see and develop.

Against these arguments, it is maintained that pornography has not been demonstrably and systematically linked to individual, group or social harms. Until such a linkage is demonstrated and supported by reasonable evidence, the dangers of invoking strict control of the material or of censorship, outweigh the potential, but unproven, harmful impacts of pornographic material. It is suggested that those who consume pornography are, like consumers of other mass media, only too well aware of the fantasy involved in pornography. Thus pornography does not cause or encourage people to act in inhuman ways. Indeed, the argument is also made that the material has a cathartic effect, allowing individuals to vent their anger and hostility vicariously. To the extent that such is the case, then pornography is not only harmless but actually beneficial to individuals and society.

It has also been suggested that the prevalent fascination with pornography is a reflection of our unease with ourselves as sexual beings. The past 20 years has seen the culmination of significant change in the sexual mores of large numbers of people within Canadian society. This has by no means been an easy transition or one with which everyone agrees, and the debate over the causes and consequences of pornography in many ways typifies the fundamental disagreements and disputes over sexual behaviour and values.

For some, pornography is merely an aberration associated with an opening up of a formerly repressed and little understood area of our lives. This line of reasoning suggests that pornography will disappear as we move to a more complete and thorough understanding of our sexuality. In its place we will see an increase in erotic literature, the portrayal of sexual activities which are mutually pleasurable and represent the exercise of real choice by each of the partners. In the meantime, the dangers associated with attempting to censor the content of the mass media are greater than the supposed harms that result from the availability of pornography.

For others, the pornography which is available today is so abhorrent and harmful that immediate action is needed to prevent or curtail access to it.

Governments are called upon to pass legislation which would allow for the effective control of what is seen to be extremely offensive and harmful material.

Our concern has been to determine whether or not all the available evidence would lead us to support one of these views rather than the other in the debate about the impacts of pornography. Although certain aspects of the issue are more amenable to empirical study than others, we recognize that academic researchers have been for some time now addressing the question of the impacts of pornography, and in particular, the harms which might be associated with its availability and use.

We have noticed, however, in the course of the public hearings, two distinct schools of thought about what research data must show in order to justify legislative action on pornography.

Those who see freedom of speech as the highest value argue that the data must demonstrate that concrete harm to individuals is caused by pornography, in order to support controls on it. They reject the idea that controls can be justified by a showing of some generalized harm, or by showing (or arguing) that pornography impairs the realization of other social values. Thus, they reject the contention of the conservatives that controls can be justified because pornography fosters disintegration of the moral values of society, the place of the family, and the sanctity of marital sexual relations. They also reject the contention of feminists that controls on pornography can be justified because pornography impedes the realization of equality for women and diminishes their humanity.

The advocates of free speech as the highest social value thus take a distinct position on what research should demonstrate. They also are firm about how they think the harm should be demonstrated. Their expectations are that before legislative action can be justified, there must be a clear or definite showing of the link between pornography and measurable harm to individuals. When measured against these two standards, the existing research, not surprisingly, falls short. There has been considerable research on the pornography harms issue, but most of it has occurred in the last 15 years, inspired at least in part by the publication of the U.S. Commission on Obscenity and Pornography[23] and the tremendous controversy it generated. As we elaborate below, this research has, as yet, given us few firm conclusions about what actual harms can be attributed to pornography. Clearly, to satisfy those who adhere to what we have previously described as the liberal philosophical view, the research must become more systematic and co-ordinated.

Let us now consider a quite different point of departure for regarding the work of pornography researchers. The basis for this other view is not the guarantee of freedom of expression which is now embodied in section 2(b) of the *Charter of Rights*. Rather it is the guarantee of equality which is found in sections 15 and 28. In particular, the point is made that these two provisions guarantee to women equality with men, including the right to the equal protection and the equal benefit of the law.

Proponents of this view argue that pornography undermines this guarantee, by portraying women as less than human, demeaned, and subordinate. They cite the impairment of the guarantee of equality as itself a harm done by pornography, reasoning that a society which accepts and fosters the portrayal of women in this fashion cannot in fact be committed to the realization of their equality. The more the pornographic message is tolerated, by, for example, refusals to penalize its most odious expressions or to control its dissemination, the longer will our efforts to realize equality be delayed.

Those who choose the equality guarantee as their point of departure approach the question of what the data should show to justify legislative intervention in quite a different way than do those who reason from the freedom of speech premise. They point out that those who seek to assert the freedom to voice virulent anti-egalitarian sentiments or purvey such images should be called upon to show that the messages do not harm the equality principle. They say that the data on pornography to date have demonstrated no beneficial effects of pornography: given that it cannot be shown to be useful, and does convey a demeaning message that inhibits equality, it is deserving of very little constitutional protection. These arguments entail the clear suggestion that the level of constitutional protection afforded to messages that are *prima facie* anti-egalitarian, would increase to the extent that such material could be shown to have a countervailing beneficial purpose.

The proponents of this equality approach are, of course, more tolerant of the existing shortcomings of empirical research about the actual harms to individuals of pornographic material. They point out that the momentum of such research is in the direction of being able to show harms, and that by contrast there is no research documenting the beneficial effects of pornography. Therefore, on balance, there has been some empirical showing which supports the argument in principle.

The differences between these two approaches to the data are quite striking. The egalitarian approach does not require that the whole burden of justifying legislation should fall upon the research data; the libertarian approach does. Moreover, the libertarian approach imposes, in effect, a very high burden of proof before the data will be taken, in the words of section 1 of the *Charter of Rights*, demonstrably to justify incursions on freedom of expression. By contrast, the egalitarian approach regards the issue of harm (and consequently justification for restraint) as resolved at least in part by the theoretical argument, coupled with empirical observation about the nature and impression of pornographic messages. Thus, its expectations about the amount and nature of empirical evidence supporting controls on pornography are not as stringent as those of the libertarians.

It is quite evident, however, that the bulk of the research on pornography has been conducted in order to address the question of harms associated with exposure to pornography. Studies demonstrating that pornography does not impede women's equality rights, for instance, are as far as we could determine, non-existent. In recasting the question to be studied we are, therefore, opening up a new area to be researched. In the meantime, we must consider the research which is available in order to understand what it says about the impacts of pornography.

Although the Committee was frequently told that research studies clearly demonstrate that harms to society and to individuals were associated with the availability and use of pornography, we have had to conclude, very reluctantly, that the available research is of very limited use in addressing these questions. We want to articulate our position very clearly: the Committee is not prepared to state, *solely on the basis of the evidence and research it has seen*, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and society. Pornography may, indeed, be a prime factor in each of the undesirable consequences mentioned but, *based solely on the evidence we have considered*, we cannot at this time conclude that such is the case.

This conclusion appears to run counter to what a great many people argued in their briefs to the Committee. Yet it seems to follow from a careful analysis of the research. We consider, however, that it is extremely important to note that this conclusion is drawn, not because the research positively demonstrates the lack of linkages between pornography and anti-social behaviour, or that pornography causes positive outcomes, but because the research is so inadequate and chaotic that no consistent body of information has been established. We know very well that individual studies demonstrate harmful or positive results from the use of pornography. However, overall, the results of the research are contradictory or inconclusive.

There are several reasons why the existing research is so unhelpful in the debate about pornography. Perhaps most fundamentally, the various researchers proceed upon different definitions of pornography. Thus, when one attempts to make comparisons between studies or to draw together the conclusions of several pieces of research, one finds that one is not dealing with a constant phenomenon. Some definitions are so specialized to the experimental situation of which they are part that they have virtually no use in other contexts. Other definitions are so general that they are essentially unusable in everyday situations or when one is attempting to draft legislation which will control those elements which are seen to be undesirable.

Definitions of pornography in the research literature include the portrayal of a whole range of explicit sexual acts, sometimes without any violence involved; sex and violence; violence without sex; and a large number of contextual factors, all of which can affect the definition of the material as pornographic.[24] There is, therefore, no accumulated body of research which deals consistently with the same phenomenon. Rather, we have hundreds of pieces of research each dealing with portrayals of a discrete form of behaviour.

The limitations of the research also arise out of the methodology used in many studies. A great deal of the research relating to pornography has been conducted using the standard experimental designs and techniques of social psychologists. Such studies are typically designed to answer the question "What effect, if any, does the viewing of pornographic material have on the viewer?" The research attempts to provide the answer to questions about the consumption of pornography in general by studying the response of those in the experimental situation, typically male university undergraduates.

All research conducted through such experimental methods confronts two problems. Firstly, can the researchers be sure that the change in the person is indeed caused by the designated stimulus, in this case the viewing of pornography? Secondly, even knowing how the subjects in the experiment reacted, what does this allow us to say about the population in general? There is, we acknowledge, some comfort to be taken from the research methodology. Researchers' confidence about the causes of attitudinal changes increases to the extent that they find people reacting in similar ways as experiments are repeated with new subjects. Similarly, the extrapolation of experimental results to people outside the experiments proceeds with more confidence when the researchers have a good theoretical understanding of why, for instance, people's attitudes may change in the way they do. Once one understands why something is occurring then one is better able to describe what sorts of people may react in a particular way under particular circumstances.

Unfortunately, the research on pornography does not demonstrate a high level of consistency of results between different experimental situations. In addition, attempts to integrate research findings into more systematic explanatory systems are few and far between.

It will also be apparent that the type of research discussed above can address only certain sorts of issues. Thus the research is typically designed to investigate the effects of seeing a considerable amount of pornography in a relatively short time. The effects which are measured are usually changes in attitude that are apparent immediately or a short time after viewing the material. Such research cannot address the effects of consuming pornography over long periods of time, for instance, whether there is a cumulative effect as people read and see pornography over months and years. Nor can it deal adequately with the issue of whether specific attitudes or changes in attitudes are related to subsequent behaviour. Holding a particular attitude may be a prerequisite to acting in a specific way. We know, however, that people do not always act in the way predicted because there are all sorts of other factors which intervene. The relationship between attitudes and behaviour is, after all, not a simple one.

A further issue not readily amenable to research in the laboratory, is that of the impact of pornography on people who may not be considered an "average Canadian adult". Such people may be especially vulnerable to the messages contained in the material. Children fit this category, but it will be obvious that for ethical reasons one cannot expose children to large doses of pornography for experimental purposes, in case it does indeed adversely affect their attitudes and behaviour. A second category is people who may already be predisposed towards violent sexual behaviour who find in pornography the ideas or legitimation for the acts they wish to perpetrate. Again, these people will not be found in laboratory experiments because of ethical considerations and because typically, we have no way of identifying the potentially violent until they are indeed violent. The effects of pornography on such people, therefore, remain unknown and will have to be investigated by means other than laboratory research, something which is yet to be done on any extensive or systematic basis. The small amount of evidence we have available so far is, again, inconclusive.

There are reports that some children who are sexually abused are required to perform in ways depicted in adult pornography. Similarly, some reports from battered women indicate that their husbands use pornography and that they expect their wives to imitate the behaviour portrayed. Research in these areas is relatively new, and it does not seem that the question of whether pornography is a precipitating factor in the illegal or anti-social behaviour has often been included in the research studies.[25] While we might expect that it will be included in the future, the untangling of what may be causal or predisposing factors' versus factors which are present but simply coincidental to the behaviour being studied, will be difficult. The same argument can be made with respect to those convicted of sexual crimes. The question of whether pornography is a factor in their crimes has not been fully studied and requires further attention.[26] As with so many other areas within the pornography debate, we have to conclude that we do not know at this time whether pornography is or is not linked to various forms of behaviour.

The discussion about the relationship between pornography and sex crimes has been long, acrimonious and inconclusive.[27] Most of this debate has focused on the correlation between the increased availability of pornography and the increase in sex crimes, rather than an analysis of the behaviour of sex offenders. Correlational research is fraught with difficulties. As we have indicated earlier in the chapter, describing and documenting the increased availability and use of pornography is no easy task. Given the difficulty of dealing with definitions of sex crimes which change over time, and the problems of the under-reporting of crimes, it is evident that documenting the rise and fall in sex crimes is equally problematic. Any undertaking which depends on putting these two very difficult areas together is obviously going to give very speculative results. In view of this, it is not surprising that most discussions of the issue conclude that the evidence for the supposed relationship between the increase in pornography and the increase in sex crimes, is not conclusive.

As suggested earlier, social-psychological research does not address the issue of long-term use of pornography. In particular, the issue of relatively low levels of exposure or use of the material over long periods of time is not amenable to experimental research. And yet, it is possible that this sort of use is characteristic of most people. Leafing through *Penthouse* or *Hustler* at the barber's, or watching the occasional adult movie on television, may be as much pornography as many Canadians see. Does this sort of use and the fact that we may be aware of the magazines in the corner grocery, lead us to accept and take for granted the themes portrayed in the material and in so doing, cause subtle shifts in our values and views about human relationships? We do not know. Here again there are enormous difficulties in separating out what value, attitudinal or behavioural changes are occurring and then attempting out of all the experiences people have, to determine whether or not pornography is a significant factor. On the one hand, the mass media are enormously influential in our lives. Advertisers, as a group, spend large amounts of money to try to change aspects of our behaviour. Whether all aspects of our behaviour are equally susceptible to change and whether our values, for example, about human dignity or equality, are also likely to shift as a consequence of seeing certain types of material in the media, are issues in need of study. Yet again, our current information is inconclusive.

Perhaps the most central issue of all which requires attention is that of defining what it is that makes material pornographic. While many studies concentrate on the effects or impacts of pornography, few deal with the question of what pornography is. The question needs careful and systematic consideration because if pornography is indeed in the eye of the beholder, as opposed to being definable in relatively precise and clear terms, then the issue of harm to individuals and society becomes increasingly difficult to address.

As we suggested earlier in the chapter, some issues in the pornography debate are not amenable to the sort of empirical research we have so far been discussing. The issue of harm to the values which we believe should be the foundation of Canadian society is a case in point and of particular importance.

While Canadian society is an amalgam of different cultures and traditions, we believe that the philosophical principles we have discussed in the first part of our report have the strong support of Canadians. These values address the fundamental nature of human beings and the sort of society which we consider generations of Canadians have been striving to achieve: sometimes successfully and sometimes not. Our social, economic and legal programs are directed towards our attaining a society in which these fundamental values are not only supported but actually reflected in the lives our citizens are able to lead. Anything, therefore, which is seen to undermine or work against this possibility has to be considered very carefully. Is the matter in question undermining the values we espouse and, if so, what course of action should be undertaken to stop or overcome the trend?

While the question of support for common fundamental values in Canadian society can be pursued through sensitive and well-designed empirical research, there has been no such research to date. In part, therefore, our statement that the values are supported rests on what we ourselves believe to be the guiding principles of Canadian society, demonstrated through official statements and action over the years and inferred from what people told us at the public hearings.

The second part of the argument, whether pornography undermines or inhibits the achievement of these values is the crux of the matter. The answer depends on how one reconciles conflict between fundamental values like equality on the one hand and freedom of speech on the other.

In the view of the Committee, there are magazines, films and videos produced solely for the purpose of entertainment whose depiction of women in particular, but also, in some cases, men and young people, demeans them, perpetuates lies about aspects of their humanity and denies the validity of their aspirations to be treated as full and equal citizens within the community.

We agree with the Justice and Legal Affairs Committee's statement made in 1978:

> This material is exploitive of women - they are portrayed as passive victims who derive limitless pleasure from inflicted pain, and from subjugation to acts of violence, humiliation and degradation. Women are depicted as sexual objects whose only redeeming features are their genital and erotic zones which are prominently displayed in minute detail.[28]

Because of the seriousness of the impacts of this sort of pornography on the fundamental values of Canadians, we are prepared to recommend that the *Criminal Code* has an important role to play in defining what material may be available within our society. Where it is not so clear that the material has the impact described above, we are suggesting instead of criminal prohibition more restricted access than is currently the case. Our proposals and the rationale for them are described in detail in the next chapter.

6. Views About Pornography

Data from the National Population Survey indicate that Canadians have widely differing views of what they would term acceptable or unacceptable material. In part, each view rests on the content of the material but it also depends heavily on who might be watching or seeing the material and the way in which the material is presented. Many Canadians appear relatively conservative in terms of the material they define as unacceptable, in allowing access to the material and in the methods they support for controlling the material. These opinions are not, however, by any means unanimous and just as one finds Canadians who would like a very restrictive regime with regard to sexually explicit materials, so there are other Canadians who contend that individuals should be free to produce, distribute and use such materials, unless others are demonstrably harmed in the process.

The following table gives an overview of the respondents' feelings about the acceptability of certain types of material.

Table 3[29]

Level of Acceptability Towards Sexually Explicit Material

	Extent of Agreement		
Statement	Agree	Neither	Disagree
All sexually explict material for adult entertainment is obscene	31%	23%	42%
Sex magazines are unacceptable in our society	45	18	35
Use of sexually explicit materials by adults is unacceptable	32	20	43
Everyone has the right to view sexually explicit material as long as it is done in private	66	15	16
Everyone has the right to produce sexually explicit materials so long as it does not hurt anyone	32	15	50

Overall, one has to conclude that Canadians are quite evenly divided in their opinions of what is acceptable and unacceptable. There is, however, stronger support for the view that people have a right to *see* sexually explicit material than they have the right to *produce* it. Table 3 gives us only a very broad view of the material which is acceptable or unacceptable. Not surprisingly, the acceptability of material depends on its specific content and the potential audience. Whether the material is available in magazines, on film or on television has little impact on the level of acceptance although there is support for specific action related to each of the media. In terms of content, respondents rated material which contained sex and violence most unacceptable, followed by homosexual intercourse, heterosexual intercourse and one or more nude men. Material containing one or more nude women was rated the most acceptable. While respondents thought viewing by themselves or other adults as reasonably acceptable, they were strongly oppposed to children being allowed to view the material.[30]

A majority of the respondents think that pornography is a problem in Canada (59%), although not as significant a problem as other social and economic issues. Indeed, only 1% of the respondents indicated that pornography is a major problem. Nevertheless, people hold very decided views about the harms associated with the use of pornography. That the viewing of violent sexual material leads people to commit acts of violence is believed by 69% of the respondents, and 48% of respondents believe that people imitate in real life the scenes they see in the violent sexual material. In addition, respondents were of the opinion that sexually explicit magazines are degrading to women (67%) and more degrading to women than men (66%).[31]

As may be expected, respondents' views on the control of pornographic material vary in accordance with their level of acceptance of such material.[32] While most people (59%) thought that the government had to take the lead role in controlling sexually explicit material, this view was held most strongly by those who found the material particularly unacceptable. Conversely, those who are more accepting of the material tend to favour personal or family discretion. There is, however, a strong sentiment, held by two-thirds of the respondents, that the police and censor boards should have more power to deal with sexually explicit material.

Respondents generally favour greater control by authorities when the material is considered to be more extreme, for example, violent sexual scenes. Some 38% of respondents suggest that magazines containing sexual violence should be banned. Thirty-one percent suggest that such films should not be allowed on television at times when children and juveniles are likely to be part of the audience and a further 25% would ban the material altogether from this medium. Similar responses are found in relation to films in movie theatres, with 36% of the respondents suggesting that such movies be banned entirely. Only when works in art galleries are considered do the respondents opt clearly for less restrictive measures and prefer family discretion. The following table summarizes responses to different types of material in the media. While indicating a preference for more control over the material being exercised, it is also apparent that respondents want to limit the access of children to such material and feel that warnings about the nature of the material should be given. Responses to the question of control and access to pornography are shown in Table 4.

Given the diversity of opinion on many aspects of the issue, it is apparent that any recommendations on the control and accessiblity of pornography will be controversial. Although nearly three-quarters of the respondents thought it very important that action be taken to deal with violent sexual material and material to which children might have access, consensus over how exactly to deal with these two issues does not exist at this time.

Table 4[33]
Actions to Deal with Sexually Explicit Scenes in Different Media

Scene and Media	Nothing/ Personal or Family Discretion	Remove Offensive Parts	Forbid Presentation Access/ Selling to Children	Advertise It May Offend	Fine or Jail Producer	Ban Such Material	No Answer
Violent sexual scenes shown in magazines	9%	14%	13%	13%	4%	38%	9%
Sexual intercourse between two adults of the same sex in entertainment magazines	13	9	18	13	4	35	8
Entertainment magazines, which could be sold at a local store or newsstand, which include pictures of nude men	19	7	34	11	3	19	7
Late night entertainment programs showing sexual intercourse between a man and women	31	11	—	27	3	19	9
Entertainment programs on TV which show nude adults at hours when children might be watching	13	9	31	12	2	25	8
Unrestricted entertainment movies which show nude adults	24	12	19	12	2	12	19
Theatres restricted to adults which show sex associated with violence	12	13	11	16	3	36	9
Sexually explicit paintings in an art gallery	49	5	10	17	1	11	7

Footnotes

[1] Jayewardene, Juliani and Talbot, *Prostitution and Pornography in Selected Countries*; W.P.P.P.#4; Kiedrowski, and van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, W.P.P.P.#1, Sansfaçon, *Agreements and Conventions of the United Nations With Respect to Pornography and Prostitution*, W.P.P.P.#3, Sansfaçon, *Pornography and Prostitution in the United States*, W.P.P.P.#2; Taylor, *The Development of Law and Debate in the United Kingdom in Respect of Pornography and Obscenity*, W.P.P.P.#14.

[2] Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, W.P.P.P.#16.

[3] Kaite, *A Survey of Canadian Distributors of Pornographic Material*, W.P.P.P.#17.

[4] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[5] El Komos, *Canadian Newspapers Coverage of Pornography and Prostitution*, 1978-83, W.P.P.P.#5.

[6] Peat Marwick and Partners, *National Population Study of Pornography and Prostitution*, W.P.P.P.#6.

[7] McKay and Dolff, *The Impact of Pornography: An Analysis of Research And Summary of Findings*; W.P.P.P.#13.

[8] Badgley Report Vol. II.

[9] Williams Report.

[10] See for instance: B. Heinrich, *Extent of Child Pornography in Texas*, Texas Legislature House Select Committee on Child Pornography, Austen, Texas, 1978, and L. Lederer (Ed.), *Take Back the Night: Women on Pornography*, (New York, Morrow, 1980).

[11] See Badgley Report, Vol. II, Chap.54, at 1243-1268, for a discussion of the availability of pornography.

[12] Peat Marwick & Partners, *op. cit.* at III.23-26.

[13] Badgley Report, Vol. II, Chap. 54.

[14] Peat Marwick & Partners, *op. cit.* at III.15-23 for discussion of use patterns and the material seen.

[15] *Ibid*, Exhibit 38.

[16] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings*, W.P.P.P.# at 31-36 for a discussion of pornographic materials.

[17] Badgley Report, Vol. II, Chap.53, at 1213-1241.

[18] N. Malamuth and B. Spinner, "A longitudinal content analysis of sexual violence in the best-selling erotic magazines", *Journal of Sex Research*, 16 (1980) at 226-237.

[19] P.E. Dietz, "Pornographic Imagery and Prevalence of Paraphilia", *American Journal of Psychiatry*, 139 (1982) at 1493-1495.

[20] D.E. Palmer, "Pornographic Comics: A Content Analysis," *Journal of Sex Research*, 15 (1979) at 285-298.

[21] Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia*, W.P.P.P.#15.

[22] See for example: T. McCormack, "Feminism, censorship, and sadomasochistic pornography", *Studies in Communications*, 1 (1980) at 37-61; and "Passionate Protests. Feminists and Censorship", *Canadian Forum*, 697 (March 1980); McKay and Dolff, *The Impact of Pornography: An Analyisis of Research and Summary of Findings* W.P.P.P.#13 at 8-15.

[23] Commission on Obscenity and Pornography, *The Report of the Commission on Obscenity and Pornography*, U.S. Government Printing Office, Washington, D.C., 1970.

[24] McKay and Dolff, *The Impact of Pornography: An Analysis of Research and Summary of Findings* W.P.P.P.#13 at 15-22 and 83-85.

[25] M. Cini, *Causes of Wife Assault, a Review of the Literature*, Department of Justice, Ottawa, 1984. (Draft report).

[26] See for instance M. Ragault, *Pornography and Violent Sexual Offenders, A Preliminary Research Report*, Department of Justice, Ottawa, 1983. (Unpublished report).

[27] See the discussion in The Williams Report, Chap.6, paras. 22-59.

[28] House of Commons Standing Committee on Justice and Legal Affairs, *Report on Pornography*, (1978) Proceedings No. 18.

[29] Peat Marwick, *op. cit.* Exhibit 27.

[30] *Ibid.*, at III.2 - 8.

[31] *Ibid.*, at III.9 - 15.

[32] *Ibid.*, at III.28 - 39.

[33] *Ibid.*, Exhibit 49.

Section II

Pornography and the Law

Summary

In this part of the Report we review the history of the law on pornography in Canada. In fact, because the term "pornography" has never been mentioned in our *Criminal Code* and it has never been defined in Canadian law, the discussion has to do with how our courts have struggled with what have been called "Canada's obscenity laws".

We first examine how the original common law test of obscenity was imported into our law from England and was subsequently replaced by the present statutory definition of "obscene".

We go on to discuss all the relevant existing sections of the *Criminal Code*. For convenience they are discussed under two headings, *Pornographic Materials* and *Pornographic Performances*. We review the utility of the present legislative scheme and the important interpretations given to many of the sections by our courts.

There have been various proposals for reform in our obscenity laws since the last major statutory revision of the *Code* in this area in 1959. We review the more significant of these proposals.

After a discussion of the implications of the *Charter of Rights and Freedoms* on the question of pornography, we then review the pertinent provisions of other federal legislation: Canada Customs, the Postal Service and Broadcasting and Telecommunications.

Finally, the last three chapters of this Section respectively study how human rights legislation, film classification and censorship, and municipal law affect the issue of pornography.

Chapter 7

The Criminal Code Provisions

1. The Meaning of Obscene

The first general statutory prohibition of obscenity was contained in section 179 of the first *Criminal Code* enacted in 1892.[1] Under this section it was an indictable offence to knowingly and without lawful excuse publicly sell obscene material or expose obscene material for public sale or to public view. The section did not include a definition of the term "obscene" and in order to apply the section the courts were forced to devise their own legal standard.

They did so by adopting the so-called *Hicklin* test devised by Chief Justice Cockburn in 1868 in *R.* v. *Hicklin.*[2] That test asked:

> whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall.[3]

and so began the difficult exercise of employing judicial interpretation to remedy statutory inadequacy.

Not surprisingly, the *Hicklin* test was subjected to severe criticism, not only from commentators who were interested in the state of the law, but also by judges of succeeding generations who attempted to apply it.

Chief among the criticisms were these:

(a) The test is flawed, firstly, because the phrase, "a tendency to deprave and corrupt" is unclear and secondly, because it is subjective: a judge or jury must infer the "tendency to deprave and corrupt" from the material itself without the aid of expert evidence of the actual impact of the material on those who encounter it;[4]

(b) The test is based on the tendency of the material to corrupt the most vulnerable individuals such as youths or abnormal adults and, therefore, places an unwarranted restriction upon the materials available to normal adults;[5]

(c) The creator's purpose and the literary, artistic or scientific value of the material is irrelevant. Furthermore, material may be found to be obscene on the basis of isolated passages rather than a consideration of the work as a whole.[6]

In spite of these criticisms, the courts were left to struggle with the *Hicklin* test for 67 years without benefit of any more precise statutory definition. It was not until 1959 that the *Criminal Code* was amended to provide a definition of the word "obscene"[7], which by then appeared in several different provisions of the *Code*. The section is now 159(8) of the *Code* and it provides:

> 159(8) For the purposes of this Act any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

It is apparent that this amendment was intended to provide a statutory definition of the word "obscene" wherever that word is used in the *Criminal Code*, at least in the context of "publications".

As we will see when we examine other sections of the *Code*, words such as "immoral", "disgusting", "indecent" and "scurrilous" are also used as constitutive elements of offences in this area, sometimes on their own and sometimes in conjunction with other terms, including "obscene". Experience has shown, however, that it is the concept of obscenity that provides the governing standard.

The new statutory definition of "obscene" presented some new problems for the courts. It was immediately necessary to determine what effect the section had on the *Hicklin* test. Did it replace it or complement it?

It was clear from statements made by the Minister of Justice when the legislation was introduced that the new statutory definition was not intended to replace the common law test. It was said that it was introduced in order to create an alternative test, which the government believed would be more effective in the prosecution of some of the new publications that had started to appear on newsstands. However, as some critics noted at the time, the government's intention to establish what was really to be a dual test of obscenity was certainly not clearly expressed in the new section.[8]

In the first cases heard after the enactment of the new definition, the courts declared that the *Hicklin* test continued to exist alongside the new statutory test.[9] However, this brief period of judicial agreement ended the first time the point was considered by the Supreme Court of Canada, in *R.* v. *Brodie, Dansky and Rubin.*[10]

By a majority of five to four the court held that D.H. Lawrence's novel, *Lady Chatterley's Lover*, was not obscene. Four judges found that the *Hicklin* test should no longer be applied to publications,[11] two judges held that it should continue to apply,[12] two judges expressly refrained from deciding the issue,[13] and one judge expressed no opinion but applied only the new statutory test.[14]

In the aftermath of the *Brodie* case and the failure of a majority of the Supreme Court to decide the status of the *Hicklin* test, it was left to the lower courts to resolve the question as best they could. They chose predominantly to apply only the statutory definition of obscenity.[15]

The confusion surrounding the *Hicklin* test was resolved to some considerable extent by the Supreme Court of Canada in its 1977 decision in *R.* v. *Dechow.*[16] The court had to decide whether the *Hicklin* test or section 159(8) should be applied in deciding whether certain sex aids were obscene. The majority of the court found that section 159(8) was the sole test of obscenity in relation to what the section referred to as a "publication". The majority gave a fairly sweeping definition to the term "publication" and found that the sex devices in question were publications because the accused had made their character "publicly known" and had issued them for public sale.

The minority held that section 159(8) was an exhaustive definition of obscenity where exploitation of sex was concerned, regardless of whether or not a "publication" was involved.

The practical result of the *Dechow* decision is that if a test of obscenity is to be applied other than the definition contained in section 159(8), the charge would have to involve either something falling outside the sweeping definition of "publication", or something that does not involve the exploitation of sex.

It seems clear, therefore, that only a few cases would not be governed exclusively by the statutory test contained in section 159(8).

We come now to consider the substantive meaning of the statutory test. It has been in force for 26 years and has been subjected to intensive and extensive judicial analysis. The courts have done their best to overcome the almost impossible task of giving contemporary meaning to abstract statutory provisions, while at the same time coping with the doctrine that precedent should be observed so that the application of the law will be predictable.

As might be expected, the criteria developed in the early cases to give flesh to the bare words of section 159(8) have been refined over time and some have even been abandoned. There is a host of decided cases and while extensive reference to the evolution of the various criteria is of interest to legal scholars, we shall, for the sake of brevity, attempt to provide as concise a statement as possible of the criteria presently being used.

Since the first treatment of section 159(8) by the Supreme Court of Canada in *R.* v. *Brodie* in 1962, the test of obscenity has been divided into two major elements:

(1) Whether a *dominant characteristic* of the representation amounts to exploitation of sex or of sex and crime, horror, cruelty or violence.

(2) Whether this exploitation is *undue* in the sense that it exceeds the contemporary Canadian community standard of tolerance.

For some time there was great uncertainty over whether the artistic purpose, artistic merit or scientific value of the material formed separate elements in the section 159(8) test, and, if so, how they were to be balanced against the two major elements. However, as will be seen, it seems now to be reasonably well established that the factors of purpose, merit and value are to be incorporated into each of the two major elements and are not to be independently weighed and balanced against them. This is the case even though, as we shall see, section 159(3) makes provision for a public good defence which itself involves an inquiry into factors such as these.

The first of the major elements has proven to be relatively uncontroversial. The court must determine what are the dominant characteristics of the material. It has been decided that if the material has more than one dominant characteristic it is only necessary for the Crown to prove that the exploitation of sex constitutes one such characteristic. To make such a determination, the material is examined as a whole with each part considered in context. It is also necessary for the court to examine the literary or artistic merit of the material. The courts have held that in determining the merit of the material, it is desirable, but not essential, that there be expert evidence.[17]

Finally, the theme or artist's purpose must be determined and the court must decide whether the sexual episodes play a legitimate role in the development of that theme or purpose. Are the episodes justified by what has been called the "internal necessities" of the theme?[18]

However, this element of the section 159(8) test now appears to be of very little practical importance. In virtually all recent obscenity cases it has been beyond doubt that a dominant characteristic of the material in question is the exploitation of sex and, in fact, the issue has generally been conceded by the accused.[19]

The more contentious element of the section 159(8) test is whether the Crown can prove beyond a reasonable doubt that the exploitation under the section is *undue*. Some observers have said that the term "undue exploitation" is a contradiction in terms and that no exploitation can reasonably be considered to be *due*. In any event, the standard of legal interpretation was first set out by Mr. Justice Judson in delivering the majority judgment in *R.* v. *Brodie*:

> Surely the choice of courses is clear cut. Either the judge instructs himself or the jury that undueness is to be measured by his or their personal opinion and even that must be subject to some influence from contemporary standards - or the instruction must be that the tribunal of fact should consciously attempt to apply these standards. Of the two, I think the second is the better choice.[20]

Therefore, the result is not to be based on a subjective personal opinion but rather on objective standards of the contemporary community. But the concept of contemporary community standards has proved to be very elusive. In what remains to this day probably the leading judgment on the community standards test, Mr. Justice Freedman's dissent in *R.* v. *Dominion News & Gifts (1962) Ltd.*,[21] it was said that such standards:

> are not set by those of lowest taste or interest. Nor are they set exclusively by those of rigid, austere, conservative, or puritan taste and habit of mind. Something approaching a general average of community thinking and feeling has to be discovered.[22]

In that judgment Mr. Justice Freedman also held that the "community" whose standards are involved in this country is the entire Canadian community, not simply the local community where the material has been found or where the prosecution takes place.[23]

Finally, Mr. Justice Freedman held that, in giving effect to section 159(8), the courts had to be sensitive to the fact that community standards were subject to the evolution of ideas and values.[24]

It must be remembered that the standards are of community *tolerance* as distinct from community *preference*. The court must decide whether, by contemporary Canadian community standards, the material is tolerable in the sense that the general average of community thinking would have no objection to the material being read or seen by those members of the community who may wish to read or see it. The question is not whether the material is an affront to personal standards, but whether the standards of the community would tolerate the publication being viewed.[25]

In determining the standards of tolerance, reference is made to several different factors, including artistic or literary merit, the purpose for which the material is being viewed or read and the context in which it is being viewed or read. A higher level of tolerance is assigned to material that possesses artistic or literary merit,[26] or is to be used for scientific or educational purposes.[27] There is also greater tolerance for material that is restricted to adults, or to a particular segment of the community, such as writers or artists, than there is for material that is generally available or publicly displayed.[28]

In assessing the purpose or the value of the material, the work is to be taken as a whole, and it is not appropriate to isolate for analysis only those parts which seem offensive. Some materials, however, especially magazines, may have no single theme and in these cases each page can be looked at more or less in isolation.[29]

If the community standards of tolerance test can be formulated with reasonable precision, it is still notoriously difficult to apply. His Honour Judge Borins of the County Court of Ontario had this to say in *R.* v. *Doug Rankine Co.:*

> [It] is a very difficult judgment to make in a community of 24,000,000 people who inhabit the second largest country in the world consisting of 3,831,012 square miles. No doubt very different levels of tolerance exist in small communities such as Goose Bay in Labrador, Dawson City in the Yukon and Nobleton in Ontario, and the large metropolitan centres of Montréal, Toronto and Vancouver. As well, Canada is a pluralistic society and different parts of that society will have different points of view. Yet it remains the task of the trier of fact, who is assumed to have his finger on the 'pornographic pulse' of the nation, to assess objectively whether or not the contemporary Canadian community will tolerate ... [the material] before the court.[30]

One of the reasons the test is so difficult to apply is that there is no onus on the Crown to prove the community standards of tolerance and in many cases the court must determine the issue without the aid of evidence. Moreover, even when evidence of community standards is admitted, the judge is free to reject it and apply what, in the light of his own experience, he regards as the contemporary standards of the Canadian community.[31]

Although expert evidence on community standards is admissible, the weight given to it varies markedly from case to case and this variation cannot be attributed even primarily to the differing expertise of the witnesses. In general, the greatest weight is given to the evidence of witnesses such as provincial film censors, who are engaged full time in the task of judging community standards.[32] However, in a number of cases the evidence of these experts has been dismissed virtually without comment.[33] Other courts have given considerable weight to the testimony of such experts as city aldermen[34] and professors of health, education and psychology.[35]

There is simply no consistency in the cases as to who qualifies as a reliable expert on community standards, and what weight should be given to their evidence.

In addition to expert evidence, the courts have also considered various other kinds of evidence regarding community standards such as the actual rulings of provincial censor boards and Canada Customs officials,[36] examples of other material which is generally available in the community,[37] and surveys of public opinion.[38] Unfortunately, it is not clear precisely how much weight has actually been given to this evidence in cases where it has been considered.

Given the difficulties involved in the application of the community standards test, it is not surprising that there has not been any real consistency of results. There are, of course, a few things which everyone appears to agree cannot be tolerated. For example, the courts seem to agree that material which portrays incest,[39] juveniles engaged in sex,[40] or acts of severe cruelty or violence in combination with sex,[41] exceeds community standards, at least unless the material has significant artistic merit or a philosophical purpose.[42]

There now appears to be growing support, as well, for the proposition that material that "degrades" or "dehumanizes" one or more of the participants in the sexual activity that is portrayed, exceeds community standards of tolerance. For example, in *R.* v. *Doug Rankine Co.*, Judge Borins stated:

> films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.[43]

This view was taken a step further in the recent judgments in *R.* v. *Ramsingh*[44] and *R.* v. *Wagner*.[45] In both of these cases, the judges held that material that "degraded" or "dehumanized" any of the participants would exceed community standards even in the absence of cruelty or violence.

It is apparent, however, that terms like "degrading" and "dehumanizing" are themselves extremely vague. Even if the proposition that "degrading" or "dehumanizing" material was obscene were to take firm hold in Canadian law, one would still expect to find conflicting decisions.

The differences of opinion in this area are particularly apparent in cases involving material containing nothing more than explicit sex. According to the judges in the three cases just cited, material of this kind should be held not to exceed community standards of tolerance. As Judge Borins put it in the *Rankine* case,

> Contemporary community standards would tolerate the distribution of films which consist substantially of scenes of people engaged in sexual intercourse, ... scenes of group sex, lesbianism, fellatio, cunnilingus and oral sex.[46]

In *Re Luscher*, however, the judge found that a magazine "concerned with the sexual activity of a man and a woman from foreplay to orgasm" exceeded community standards even though the actions portrayed were "in no way unnatural or unlawful and, indeed ... are a common part of the lives of Canadian men and women".[47] And in a New Brunswick case, the trial judge found that community standards were exceeded by magazines which he described as follows:

> The magazines are most explicit and depict sexual conduct, not merely nudity. The conduct shows lesbianism, homosexuality and heterosexuality. Male and female genitalia are explicitly photographed.... There were no pictures depicting sex and 'the subject crime, horror, cruelty or violence' as set out in s. 159(8). The pictures appear to be of adults consenting to the sexual acts of other(s).[48]

Another striking example of inconsistency is found in two cases involving sex aids. A Nova Scotia County Court judge held in one case that lubricants, devices, prosthetics and novelties sold by a sex shop exceeded community standards of tolerance. In contrast, an Ontario County Court judge only three years before had concluded that similar products were not only tolerable, but in the public interest.[49]

The application of the community standards test has also produced inconsistent results in cases involving live performances. Some judges have found that the community standards of tolerance are exceeded when the whole of a person's body is exposed.[50] Others have found that complete exposure unaccompanied by suggestive touching, expressions or gyrations does not exceed community standards,[51] but that when the performance does include suggestive touching and gestures, it does exceed community standards.[52] Still others have found that the performance of a completely nude couple engaged in simulated sexual acts does not exceed community standards.[53]

Taking everything together, it is not difficult to agree with one judge who observed recently that:

> The lack of unanimity in the decisions of the courts in obscenity cases suggests that the Canadian contemporary community standard may very well be a very elusive, not readily discernible, and ill defined standard.[54]

We turn now to a consideration of the specific offences contained in the *Criminal Code*. For convenience, we have organized these offences under two headings, *Pornographic Materials* and *Pornographic Performances*.

2. Pornographic Materials

2.1 Section 159(1)(a) and (2)(a) —Publishing, Distributing and Selling

> 159. (1) Every one commits an offence who
>
> (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever....
>
> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
>
> (a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatsoever....
>
> (6) Where an accused is charged with an offence under subsection (1) the fact that the accused was ignorant of the nature or presence of the matter, picture, model, phonograph record, ... or other thing by means of or in relation to which the offence was committed is not a defence to the charge.

These two offences, which are the major offences in this area, distinguish between two classes of persons, those who *produce or distribute* obscene material and those who *sell* obscene material. It is necessary for the Crown to prove that the accused actually knew the material was obscene in order to convict him of *selling* it. Proof of actual knowledge is unnecessary in order to convict someone for *producing or distributing* the material.

This important distinction is reinforced by subsection (6) which records that ignorance of the nature or presence of the obscene material is no defence to a charge under subsection (1) of producing or distributing the material. By implication, ignorance of such matters is a defence to a charge under subsection (2) of selling the material.

In general, it appears that section 159(1)(a) applies to the manufacture and wholesale distribution of obscene materials while section 159(2)(a) applies to retail sales.[55] This is consistent with what the courts consider to have been the purpose in making a distinction between the seller and the distributor. It is assumed that manufacturers have knowledge of the product they create and that distributors can and should know what they are wholesaling to retailers. It has been argued that the retail seller cannot reasonably be expected to know the actual contents of the variety of materials he has for sale.[56]

It has followed from this reasoning that a retailer who handles primarily obscene materials and not simply a "scattered few" may properly be classified as a distributor and charged under section 159(1)(a).[57]

It should be noted, however, that the courts have found that the two provisions are not mutually exclusive, and that a person who sells may also be a person who distributes and vice versa. The Ontario Court of Appeal has held that, "if a person has in his possession obscene matter for the purpose of distribution, [it does not matter] whether the means of distribution be sale, consignment for sale, free distribution or otherwise".[58]

It is of current interest to note that *rentals* have been held to be a form of distribution or circulation and not of sale. Hence video cassette rentals would appear to fall under section 159(1)(a).[59]

By contrast, the presentation of films alleged to be obscene has traditionally led to a charge under either section 159(2)(a) (exposing to public view) or section 163 (presenting an obscene performance or representation).

As a rule, it is incumbent on the Crown in criminal cases to prove knowledge or *mens rea* in order to obtain a conviction. That requirement can, however, be expressly excluded. By virtue of section 159(6), such an exclusion is contained in section 159(1)(a) for those charged with the manufacture or distribution of obscene material. In all of the other sections of the *Code* governing obscene materials, however, the Crown must prove that the accused knew the nature and content of the obscene representation.

This does not mean that the Crown must prove that the accused possessed the legal knowledge that the representation was obscene: that would turn the accused into the judge of his own guilt. It is sufficient if he is proved to have known, or to have been wilfully blind to, the subject matter of the representation.[60]

Furthermore, it is not incumbent on the Crown to show that the accused had actually viewed the material. It is sufficient to show that the accused knew the general nature of the material, that is, that he knew that the dominant characteristic of the material was the exploitation of sex. This knowledge may be inferred from all of the evidence. For example, evidence of the circumstances under which the material was displayed, or evidence that the accused had been warned about the nature of the material, may be sufficient to prove knowledge.[61]

However, where the accused has not actually viewed that material, it is impossible to state precisely what evidence would constitute sufficient proof of knowledge. For example, it has been held that where the accused could not read English, the mere fact that the police had on one occasion seized a large number of books under section 160 on the ground that they believed them to be obscene, and on a second occasion warned the accused that some of his books may be obscene, was insufficient to prove that the accused knew or was wilfully blind to the nature of yet another book in his store.[62] Similarly it has been held that where the accused had not read the book, the fact that he displayed it under a sign "Banned in Michigan" and beside a newspaper clipping with the headline "O'Hara's Book Naughty", was insufficient to prove knowledge or wilful blindness.[63]

It appears, therefore, that in those cases in which the accused has not actually viewed the material, the burden on the Crown to adduce sufficient evidence to prove knowledge is not easily satisfied.

For there to be an offence under section 159(2)(a), in addition to requiring proof of knowledge the relevant act must be done "without lawful justification or excuse". Where the Crown proceeds summarily, the burden of proof has been held (somewhat surprisingly) to rest on the accused to prove by a preponderance of evidence that he had a lawful excuse.[64] When the Crown proceeds by way of indictment, it is clear that the onus rests upon the Crown to prove beyond a reasonable doubt the *absence* of a lawful excuse. However, where the facts do not disclose the lawful excuse, and the accused fails to raise the issue and at least adduce some evidence, the trial judge is entitled to infer that there is no lawful excuse. The Crown is not obliged to canvass every conceivable justification that could be advanced on behalf of the accused.[65]

It is not clear, however, what constitutes a "lawful justification or excuse". For example, the case law at the present time is unclear as to whether or not approval by provincial censorship authorities will suffice. In *R.* v. *McFall,*[66] it was held that such approval did not provide the lawful excuse. The issue has been argued in the Supreme Court of Canada very recently in *R.* v. *Town Cinema Theatres (1975) Ltd.*[67] and judgment is still reserved.

A further example of the present confusion arose in an Ontario case where the accused's honest belief that the materials were not obscene did not constitute a lawful excuse, even though the belief was based on the knowledge that the obscenity charges against the same poster had been dismissed in another Canadian jurisdiction.[68]

While section 159 prohibits the possession of obscene material for the purpose of publication, distribution, circulation, sale or exposing to public view, it does not prohibit the possession of obscene material for private use. While *private* possession is not prohibited, the situation becomes less clear if a person shows his obscene materials to others. In *R.* v. *Rioux,*[69] the accused owned some obscene films which he showed on three occasions to a group of some ten persons. The Supreme Court of Canada acquitted the accused, finding that showing obscene pictures to a friend or projecting an obscene film in one's own home is not in itself a crime. It was held to constitute neither circulation (under section 159(1)(a)) nor exposure to public view (under section 159(2)(a)) of obscene materials.

Similarly, if obscene films are shown in a community hall exclusively to invited friends and relatives, the situation is tantamount to a showing to a private gathering in one's own home and is not prohibited by section 159.[70]

However, if only a few people, who are neither friends nor invited guests of the accused, pay to attend a showing of obscene films at what is otherwise a private party, it ceases to be a private showing and is prohibited by section 159.[71]

While it is not illegal to possess obscene material for private use, it may be illegal to *make* obscene material even for exclusively private use. In *Re Hawkshaw and the Queen,*[72] the accused submitted to a developing laboratory a role of film containing a picture of four persons, one of whom was performing fellatio on a 17 year-old boy. Although the Ontario Court of Appeal accepted that the accused intended only to use the photograph for private viewing, it found that the meaning of section 159(1)(a) was clear:

> Parliament intended it to be an offence to make or to print an obscene picture, even though it might not be made for the purpose of publication or was not made known to the public.[73]

Accordingly, the accused was committed to stand trial for the offence. The case is presently on appeal to the Supreme Court of Canada.

It is apparent from this review of sections 159(1)(a) and 159(2)(a) that they have given rise to a number of problems. First, there is the fact that the offences overlap with each other. Given the different *mens rea* (guilty intent) requirements of the two offences, this is a problem of some significance. Second, there is the problem of the inconsistent treatment of videos and films, with the former falling under section 159(1)(a) and the latter falling under section 159(2)(a). This, too, is a serious problem, and for the same reason. Third, there is the difficulty in construing and applying the phrase "without lawful justification or excuse" in section 159(2)(a). Any proposals for reform in this area would have to take these problems into account.

2.2 Other Section 159 Offences

> (2) Every one commits an offence who knowingly, without lawful justification or excuse,
>
> (b) publicly exhibits a disgusting object or an indecent show,
>
> (c) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage, or
>
> (d) advertises or publishes an advertisement of any means, instructions, medicine, drugs or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

It is interesting to note that, until 1969, it was also an offence under section 159(2)(c) to advertise articles "intended or represented as a method of preventing conception".

None of these offences appears to be of much importance nowadays. One of the very few reported cases to consider section 159(2)(b) was *R.* v. *Stewart,*[74] in which the accused had been charged with exhibiting a button with the phrase "Fuck Iron" on it. The court concluded that "disgusting" meant "turning the stomach" or "giving rise to a strong distaste or repugnance" and acquitted the accused.

The dearth of case law on section 159(2)(b) makes it difficult to know whether this provision could be used to control public displays of pornographic magazines. One suspects that the use of the words "object" and "show" would make this difficult. And it is by no means clear that the kinds of displays that people object to would be caught by the term "disgusting".

Neither section 159(2)(c) nor section 159(2)(d) has given rise to any reported cases, at least in its current form. One wonders, in fact, why they continue to exist, particularly section 159(2)(d).

2.3 Section 159(3)(4) and (5) — The Public Good Defence

> 159. (3) No person shall be convicted of an offence under this section if he establishes that the public good was served by the acts that are alleged to constitute the offence and that the acts alleged did not extend beyond what served the public good.
>
> (4) For the purposes of this section it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
>
> (5) For the purposes of this section the motives of an accused are irrelevant.

Even if the facts would support a conviction under section 159, the accused may invoke section 159(3) and avoid that conviction if he can establish that the acts in question served "the public good" and "did not extend beyond what served the public good". But, as one commentator has noted, this defence is somewhat paradoxical, at least in the context of sections 159(1)(a) and 159(2)(a):

> How can obscenity ever be in the public interest? Obviously something is wrong. Either the public has a perverted sense of what is good for it or the definition of what constitutes obscenity is perverted.[75]

The paradoxical nature of the section 159(3) defence is reflected in the fact that it is rarely invoked; it seems clear that very few representations found to be obscene by modern standards can make any pretence to serving "the public good".

Furthermore, the meaning of the defence is exceedingly obscure. Section 159(5) provides that "the motives of an accused are irrelevant", but that tells us very little. What judicial guidance there is can be found in the decision of Mr. Justice Laidlaw of the Ontario Court of Appeal in *R.* v. *American News Ltd.* where he states:

> Again, what is included in the words 'public good'? Surely it does not mean benefit or advantage to the public of every conceivable kind. I suggest that the limitation of those words ... [is] that which is 'necessary' or advantageous to religion, or morality, the pursuit of science, literature or art, or other objects of general interest. Without such limitation or description the defence is of such a vague, indefinite character as to be almost impracticable both in theory and in practice.[76]

However, a representation does not serve the public good merely because it possesses literary, artistic, or scientific merit. In *R.* v. *Cameron,*[77] the defence argued that a collection of drawings found to be obscene nevertheless possessed substantial artistic merit and, therefore, served the public good by assisting students of art and educating the public in the appreciation of art. While the Ontario Court of Appeal accepted the expert evidence that the pictures possessed some artistic merit, it was not prepared to find that they served "the public good". The court could see no reason why:

> it is either necessary or in the service of the public good so far as the teaching of art is concerned or the education of the public, unduly to exploit the theme of sex as a dominant characteristic in the portrayal of the human figure or figures.[78]

If this interpretation of section 159(3) is correct, it would seem that, regardless of the degree of artistic merit, no obscene picture can serve the public good.

In *R.* v. *Delorme,*[79] the Québec Court of Appeal similarly rejected the defence of public good after finding the book *Histoire d' Or* to be obscene. The court accepted the expert testimony that the book possessed literary and scientific value. However, the court reasoned that this value could only serve to benefit psychologists and sexologists and that the distribution of the book was not limited to these individuals. It was distributed to members of the general public who, according to the court, would be incapable of discussing the symbolic and psychological meaning of the book. Thus, despite its scientific and literary value, it could not be said to serve the public good. Of course, had the distribution of the book been limited to sexologists and psychologists, there would likely have been a finding that the book was not obscene and hence there would have been no need to consider section 159(3).

The only reported case in which the defence of public good has been successful is *R.* v. *Sutherland, Amitay and Bowie.*[80] In that case the court held that "it serves the public good to make available to those persons that so desire aids so that they may enjoy or further enjoy legitimate sexual acts and sexual harmony".[81] However, it should be noted that the finding on this point was unnecessary as the judge had already found that the sexual aids and devices were not obscene.

It would appear, therefore, that the section 159(3) defence of public good is of little importance. Its meaning is extremely obscure and with the modern view of obscenity it is unlikely that any material found to be obscene could be said to serve the public good.

2.4 Section 160 — Warrant of Seizure

> **160. (1) A judge who is satisfied by information upon oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene ... shall issue a warrant under his hand authorizing seizure of the copies.**

(2) Within seven days of the issue of the warrant, the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized and alleged to be obscene ... may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the said matter.

(4) If the court is satisfied that the publication is obscene ... it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication is obscene ... it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XVIII and sections 601 to 624 apply *mutatis mutandis* (completely and without exception).

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, no proceedings shall be instituted or contained in that province under section 159 with respect to those or other copies of the same publication without the consent of the Attorney General.

(8) In this section
"court" means

(a) in the Province of Quebec, the provincial court, the court of the sessions of the peace, the municipal court of Montreal and the municipal court of Quebec;

(a.1) in the Provinces of New Brunswick, Alberta and Saskatchewan, the Court of Queen's Bench;

(b) in the Province of Prince Edward Island, the Supreme Court; or

(c) in any other province, a county or district court.

"judge" means a judge of a court.

This important section permits proceedings to be taken against material without laying charges against anyone. It provides for a two-stage procedure. The first stage involves an application which, if successful, results in a warrant being issued to seize the material in question. It is to be noted that, in making the application, the person swearing the information must state that there are reasonable grounds for believing that the material in question is being kept for sale or distribution. It is not enough simply to state that there are reasonable grounds for believing that the material is obscene. It is clear, therefore, that section 160 is aimed at commercial dealings in obscene material.

The second stage involves a summons being issued to the occupier of the premises from which the goods were seized. The occupier as well as the owner and the author of the material are entitled to appear in court and be heard on the question of whether the seized material is obscene and, therefore, to be forfeited to the Crown.

While subsection 2 states that the occupier must "show cause" at the second stage hearing, it has been decided that the onus is on the Crown to prove obscenity (as defined in section 159(8)) beyond a reasonable doubt.[82] It is also clear that no sanction can be imposed personally upon the occupier if he fails to attend the second stage hearing.[83] In order to reduce the possibility of double jeopardy, subsection (7) records that once an order is made declaring the material to be obscene and forfeited to the Crown, no proceedings under section 159 against an individual can be instituted or continued with respect to the same publication.

A review of the cases shows that in the 1960s it was commonplace for the Crown to proceed against material under section 160. So far as we have been able to tell, the section is virtually in complete disuse at the moment. The reasons we have been given by some law enforcement officials are that their resources are limited and they can, therefore, contemplate proceeding against only the "worst" of the material and that in these cases, proceedings against the individual distributors or sellers seem more appropriate and more likely to deter others than proceeding against the material itself. We have also been told that the section creates administrative problems resulting from storage and supervision of the seized material. There have been recent judicial suggestions that the section be better utilized by the authorities.[84] We will consider these suggestions when we come to discuss proposals for reform.

Although the point does not appear to have been argued, some courts appear to have accepted that the section can be used by a private citizen seeking to control the commercial exploitation of obscene material. There is certainly nothing in the language of the section to suggest that a private citizen lacks standing to come to court seeking that a warrant be issued in what we have described as the first stage proceeding. If the judge hearing the private citizen's application issues a warrant, it is uncertain whether any Attorney General would be entitled to usurp the private citizen's initiative by staying the proceedings. So far as we have been able to tell, the point has not yet arisen.

2.5 Section 161 — Tied Sales

> 161. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may be obscene....

This section came into the *Code* in 1959, at the same time that section 159(8) was introduced. At our public hearings we were told about complaints by retailers of magazines and periodicals that the very practice prohibited by the section was in fact occurring. However, we received no such complaint directly from a retailer. We have been unable to discover any reported cases on the section and are unaware of any recent prosecutions.

2.6 Section 162 — Restriction of Publication of Reports of Judicial Proceedings

> 162. (1) A proprietor, editor, master printer or publisher commits an offence who prints or publishes
>
> (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals;
>
> (b) in relation to any judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation or restitution of conjugal rights, any particulars other than
> (i) the names, addresses and occupations of the parties and witnesses,
> (ii) a concise statement of the charges, defences and countercharges in support of which evidence has been given,
> (iii) submissions on a point of law arising in the course of the proceedings, and the decision of the court in connection therewith, and
> (iv) the summoning up of the judge, the finding of the jury and the judgment of the court and the observations that are made by the judge in giving judgment.
>
> (2) Nothing in paragraph (1)(b) affects the operation of paragraph (1)(a).
>
> (3) No proceedings for an offence under this section shall be commenced without the consent of the Attorney General.
>
> (4) This section does not apply to the person who
>
> (a) prints or publishes any matter for use in connection with any judicial proceedings or communicates it to persons who are concerned in the proceedings;
>
> (b) prints or publishes a notice or report pursuant to directions of a court; or
>
> (c) prints or publishes any matter
> (i) in a volume or part of a *bona fide* series of law reports that does not form part of any other publication and consists solely of reports of proceedings in courts of law, or
> (ii) in a publication of a technical character that is *bona fide* intended for circulation among members of the legal or medical professions.

This rather curious provision was originally enacted in 1938,[85] carried over with some changes into the 1953-54 *Code*,[86] and reproduced verbatim in the present *Code* renumbered as section 162. There appear to have been no cases decided under section 162 or its predecessors.[87]

No discussion accompanied the enactment of the 1938 provisions. In the House of Commons, all that was said was that the section:

> ... is a reproduction of the English law with respect to the publication of details and reports of judicial proceedings which may be calculated to injure public morals.[88]

In the Senate, the only comments were that the section was similar to the British provisions, that it was a "padlock law" and that it was directed against "yellow journalism".[89]

In an attempt to find out precisely what section 162 is aimed at, we examined the origins of the parent English legislation. The *British Judicial Proceedings (Regulation of Reports) Act, 1926*[90] was introduced in the British Parliament in four consecutive sessions, beginning in 1923. Each time there was debate.[91]

The 1926 debates of the House of Commons are particularly informative.[92] It was noted that concern over the publication of "objectionable" reports had been voiced at an early date by Queen Victoria herself:

> On 26th December 1859, her late Majesty Queen Victoria wrote as follows to Lord Chancellor Campbell:
>
> The Queen wishes to ask the Lord Chancellor whether no steps can be taken to prevent the present publication of proceedings before the new Divorce Court. These cases, which must necessarily increase when the new law becomes more and more known, fill now almost daily a large portion of the newspapers, and are of so scandalous a character that it makes it almost impossible for a paper to be trusted in the hands of a young lady or boy.[93]

The Queen's concern was evidently shared by the 1926 Parliament. The legislation was meant to be applied to the suggestive sexual details likely to come out in divorce proceedings. Those details, it was felt, would be published by some journals in order to increase their circulation. It was thought that such publication would lead to a deterioration of public morals. One Parliamentarian said:

> There are, however, certain journals which it is needless to specify who deliberately exploit for gain, reports of judicial proceedings of an unsavoury character. It is a horrible traffic. One can scarcely imagine a more horrible traffic.[94]

The objectionable reports were said to be constituted by "... a mass of detail, more suggestive than actually indecent ...."[95]

There was extensive debate on the merits of the proposed legislation, especially regarding the conflicting interests of freedom of the press and protection of public morals.[96] One particularly interesting argument *against* the legislation was that the prospect of publication of the intimate details of one's sexual misconduct would serve as a deterrent to the kind of behaviour that could result in divorce proceedings.[97] To that it was answered that the fear of publication would probably not deter anyone.[98]

The *Act* was said to be based upon previous legislation[99] and it was anticipated that the courts would employ the test in *R.* v. *Hicklin*[100] as to what was to be considered a threat to public morals.

We were able to find only one reported case under the British legislation. That is *Duchess of Argyll* v. *Duke of Argyll*.[101] However, the case is of only marginal interest; it deals with the rights of parties to a divorce proceeding to seek an injunction against the publishing of details of the proceeding.

2.7 Section 164 — Mailing Obscene Matter

> 164. Every one commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 162(4).

In the chapter of this Report dealing with Canada Post we discuss the interpretation that has been given by the courts to this section. It should be observed, however, that the words "indecent, immoral or scurrilous" are not defined in the *Code* or in any other Canadian statute.

3. Pornographic Performances

While there are a number of sections in the *Code* governing pornographic acts or performances,[102] sections 163 and 170 are the most important.

3.1 Section 163 — Immoral Theatrical Performance

> 163. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.
>
> (2) Every one commits an offence who takes part or appears as an actor, performer, or assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

The term "theatre" is defined in section 138 of the *Code* as follows:

> theatre includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission.

The question of whether the definition of "obscene" in section 159(8) is to be imported into section 163 has been answered by the courts on the basis of the medium in question. In 1973 the British Columbia Court of Appeal in *R.* v. *Small*[103] decided that the definition in section 159(8) related only to books and did not apply to live theatrical performances. The majority of the court concluded that the word "obscene" should be given a meaning that amalgamates the dictionary meaning, the *Hicklin* test and the dissenting judgment of Mr. Justice Freedman in *R.* v. *Dominion News & Gifts (1962) Ltd.*[104]

However, the Court of Queen's Bench in Alberta has held that the section 159(8) definition does apply when the entertainment is a movie and, therefore, a "publication" within the meaning of that section.[105] The trial decision was affirmed by the Alberta Court of Appeal and, as we have already mentioned,[106] judgment has been reserved by the Supreme Court of Canada.

The section also raises the question of the appropriate meaning to be given to the words "immoral" and "indecent", in the absence of a statutory definition.

The Supreme Court of Canada has held that simply because a performance is done in the nude does not make it "immoral" within the meaning of the section, and the fact that being nude in a public place is an offence under section 170 is irrelevant to a charge under section 163.[107]

In another case, decided in 1982, the Ontario Court of Appeal decided that the trial judge had been wrong in deciding that " 'immorality' is of a lesser degree of seriousness than 'indecency' or 'obscenity' ".[108] However, the court agreed with the trial judge that the test was one of community standards of tolerance and that the following factors should be taken into account in applying that test:

> (1) the locale of the performance; (2) the forewarning of the public of the nature of the performance; (3) the condition of admission; and (4) the size and nature and the extent of the reception of the audience to the particular performance and to similar performances[109] ...;

The court also thought that the accused's purpose in giving the performance should be considered.[110]

Inasmuch as leave to appeal this decision to the Supreme Court of Canada was refused, we can treat the test as being settled. What remains unclear is whether the test is precisely the same as the community standards test applied by the courts in interpreting section 159(8). Put another way, does the community standard of tolerance concerning "immorality" and "indecency" differ in any way from the community standard of tolerance with respect to "obscenity"?

3.2 Section 170 — Nudity

> 170. (1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order.
>
> (3) No proceedings shall be commenced under this section without the consent of the Attorney General.

The section raises at least three questions immediately. First, can a charge be brought under it in respect of a theatrical performance, notwithstanding the separate offence created by section 163(2)?

Second, is there a difference between being nude and being naked? Subsection (2) indicates that whether a person is nude depends on whether he or she is "so clad as to offend against public decency or order". For a while there was some confusion as to whether a person who had no clothes on in a public place could commit the offence simply by being naked.

Third, what will constitute a "lawful excuse" under the section?

All three questions were addressed by the Supreme Court of Canada in 1978 when the court unanimously decided in *R.* v. *Verrette*[111] that:

(a) A charge may properly be brought under section 170 in theatrical performance cases notwithstanding the separate offence created by section 163(2) of appearing as a performer in an immoral, indecent, or obscene performance in a theatre.

(b) A dancer performing completely unclad in a public place contravenes section 170 in the absence of lawful excuse, and there is no additional requirement that the nudity offend against public decency or order. However, the performance of a dance in a public place by a dancer who is not completely unclothed contravenes section 170 only if the performer is so clad as to offend against public decency or order.

(c) A "legitimate theatrical performance" or "escaping from a house on fire" or "running from a rapist", or "modelling in a lecture hall for art students" may constitute a lawful excuse for nudity.

There is also, of course, the question of what test is to be applied to cases of partial nudity. According to the Ontario Court of Appeal, this test is to be the same as that employed in cases arising under section 163.[112] In other words, the test of what offends "public decency" in subsection (2) is the community standard of tolerance for the actions of the accused in the particular circumstances of the performance.

Thus we are left with rather a curious situation. If the accused is completely nude in a public place without lawful excuse, and the Attorney General consents to proceedings under section 170, the accused will be convicted. However, if the accused is partially clad, there is no guarantee of conviction under section 170, since it must be shown that the partial nudity offends the community standard of tolerance. As might be expected, this unusual situation has led to rather unusual behaviour. "Exotic dancers", while sequentially exposing every part of their bodies, are careful always to retain some small piece of clothing so as to avoid being completely nude. As one would expect, this has given rise to much argument in the cases about what exactly constitutes complete nudity. Will any speck of clothing suffice, or must the coverage be reasonably substantial? In *R.* v. *McCutcheon*[113] the Quebec Court of Appeal held that an "exotic dancer" who wore a "thin transparent veil attached at the neck" was not completely nude. Similarly, in *R.* v. *Szunejko,*[114] an Ontario case, an "exotic dancer" wearing a see-through negligee which was open in the front was found not to be completely nude. However, in *R. v. Diaz,*[115] another Ontario case, an "exotic dancer" wearing only a brassiere open at the front was found to be completely nude. The judge in that case reasoned that nudity should be determined by considering what parts of the body are exposed and what percentage of the body is exposed. He concluded that where all the private parts are exposed and, at the same time, 99.99% of the body, a person is completely nude.

4. Penalties

Under section 165, the Crown is empowered to commence proceedings either by indictment or summarily in the case of prosecutions under sections 159, 161, 162, 163 and 164. The Crown can only proceed summarily in the case of prosecutions under section 170.

An accused who is convicted on indictment is liable to imprisonment for two years. A fine may be imposed in lieu of or in addition to a term of imprisonment.[116] An accused who is convicted summarily is liable to imprisonment for six months. Again, a fine may be imposed in lieu of or in addition to a term of imprisonment. That fine cannot, however, exceed $500.[117]

The Committee was unable to discover any reliable statistics on the relative frequency of the Crown proceeding by way of indictment rather than summarily in those cases where it had a choice. The Committee's impression is, however, that most prosecutions are proceeded with summarily.

Reliable statistics on the punishments imposed in this area are also unavailable. Terms of imprisonment appear to be imposed very seldom, however. The usual punishment is a fine and, because of the preference of the Crown to proceed summarily, the fines tend to be very small. On occasion, however, a significant fine of several thousand dollars is imposed.

5. Past Proposals for Reform

Past proposals for the reform of the *Criminal Code* provisions in this area have come from many different sources and have taken many different forms. The proposals made by private individuals and organizations are discussed elsewhere in this report and will not be examined here. The focus here is on the proposals that have been made by public officials and bodies. These proposals are found in bills introduced in the House of Commons but not passed, the Report on Pornography submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs, a paper published by the Law Reform Commission of Canada, and a suggestion emanating from the Bench.

The last decade has seen some forty bills introduced into the House of Commons on the matter of pornography. The majority of these proposed amendments of one form or another to the *Criminal Code*. The only such bills that were enacted into law concerned the definition of the word "court" in section 160.[118] Of the others, all but four were private members' bills. It is not surprising that these bills were not enacted into law, for it is an unusual occurrence when a private member succeeds in getting a bill through the House. One of the government-sponsored bills is currently before the House, so it may yet become law.[119] Why the other three government-sponsored bills were not enacted into law is unclear.[120] One presumes it was simply a matter of government priorities.

The general purpose of both the private members' bills and those with government support has been to tighten the grip of the *Criminal Code* on pornography. A large number of the bills were designed to ensure that children were accorded better protection from pornography. These bills are discussed in the part of this report that deals with children and will not be examined here.

Other objectives reflected in these bills include increasing the penalties in this area,[121] ensuring that material in respect of which convictions are registered under provisions like sections 159 and 164 is forfeited to the Crown,[122] eliminating the use of opinion evidence on community standards,[123] and providing better protection against public displays of pornography.[124] As well, suggestions have been made for revisions to section 159(8).[125] Some of these suggestions reflect an American influence since they include quite detailed descriptions of the kinds of sexual activities that are not to be described or depicted.[126]

The most recent proposal with respect to section 159(8) is found in Bill C-19 of 1984.[127] An omnibus *Criminal Code* amendment bill sponsored by then Minister of Justice, Mr. Mark MacGuigan, it would have repealed the existing section 159(8) and replaced it with the following:

> 159 (8) For the purposes of this Act, any matter or thing is obscene where a dominant characteristic of the matter or thing is the undue exploitation of any one or more of the following subjects, namely, sex, violence, crime, horror or cruelty through degrading representations of a male or female person or in any other manner.

This provision differs from the existing section 159(8) in three important respects. First, it makes it clear that the definition applies to "any matter or thing" and not just to "any publication". Given the decision of the Supreme Court of Canada in *R. v. Dechow*[128] regarding the status of the *Hicklin* test, such a clarification would likely have put that test to rest. In other words, had the revised version of section 159(8) contained in Bill C-19 become law, there would have been nothing left to which the *Hicklin* test could have been applied.

The second important change lies in the removal of the requirement contained in the existing section 159(8) that violence, crime, horror and cruelty be combined with sex in order for them to be considered obscene. This change would obviously have significantly broadened the scope of section 159(8).

The third change of note is the express reference to the notion of degradation. The amended provision would have made explicit what a number of the most recent section 159(8) decisions have held to be implicit,[129] namely, that "undue exploitation" can take the form of "degrading representations" of men or women. Whether it would have been held to have gone further than that and to have *required* that material that contained "degrading representations of a male or female person" be held to be obscene is unclear.

The only proposal in all these bills that would have *relaxed* the grip of the *Criminal Code* on pornography is found in the two most recent government-sponsored bills. That proposal was to make it necessary to obtain the consent of the provincial Attorney General before proceedings could be commenced under section 159 or section 163 in respect of films or videos that were being shown in accordance with provincial film review legislation. This amendment was obviously designed to provide at least some protection from prosecution to those who receive the approval of their provincial film classification board to show a particular film or video.

The Report on Pornography that was submitted to the House of Commons in 1978 by the Standing Committee on Justice and Legal Affairs[130] contained a total of eleven recommendations, six of which called for amendments to the *Criminal Code* and one of which called for new legislation at the provincial and municipal levels. The other four recommendations dealt with enforcement practices. The thrust of all these recommendations mirrored that of the proposals contained in the bills that we have just examined. They were all designed, in other words, to strengthen the law.

The underlying philosophy of the Report is reflected in the following passage:

> The clear and unquestionable danger of this type of material is that it reinforces some unhealthy tendencies in Canadian society. The effect of this type of material is to reinforce male-female stereotypes to the detriment of both sexes. It attempts to make degradation, humiliation, victimization, and violence in human relationships appear normal and acceptable. A society which holds that egalitarianism, non-violence, consensualism, and mutuality are basic to any human interaction, whether sexual or other, is clearly justified in controlling and prohibiting any medium of depiction, description or advocacy which violates these principles.[131]

Insofar as the *Criminal Code* is concerned, this philosophy led first to a recommendation that section 159(8) be replaced by a new provision that would incorporate not only a revised general definition of obscene but also a special definition of obscene to deal with child pornography.[132] Insofar as the former is concerned, the language bears a close resemblance to that found in Bill C-19. The only difference is that the concept of degradation constitutes a separate test, that of "undue degradation of the human person", rather than being part and parcel of the "undue exploitation" test. The actual language of the general definition was as follows:

> 159 (8) For the purposes of this Act, a matter or thing shall be deemed to be obscene where ... a dominant characteristic of the matter or thing is the

> undue exploitation of sex, crime, horror, cruelty or violence, or the undue degradation of the human person....[133]

From this recommendation, the Report proceeded to a number of subsidiary recommendations about prosecutions under section 159. It suggested that opinion evidence should not be admissible on the question of community standards[134] and that the Attorney General should be able to override an accused's election regarding mode of trial and request a trial by jury.[135] It also recommended a substantial increase in the penalties for section 159 and for sections 161, 162, 163 and 164.[136] And, finally, it recommended that materials in respect of which a conviction is obtained under sections 159 and 164 be forfeited to the Crown.[137]

The Report contained a separate recommendation to deal with the procurement of children to participate in the production of sexually explicit materials. This recommendation is discussed in the chapters on children.

One final recommendation of note deals with section 160 of the *Code*. The Report suggested that, where a charge was laid under section 159, section 160 should be used to stop the further dissemination of the material in question while the prosecution under section 159 proceeded.[138]

Although none of the recommendations in the Report relating to the *Criminal Code* has given rise to any amendments, some of them did find their way into two of the government-sponsored bills mentioned above. Bill C-21, which was introduced into the House of Commons in November of 1978, borrowed heavily from the Report in respect of its proposals regarding both section 159(8) and increased penalties for offences under section 159. And the slightly revised version of section 159(8) that was proposed in Bill C-19 of 1984 obviously had its roots in the Report's recommendation regarding that provision.

The Law Reform Commission of Canada has published two papers on obscenity and the criminal law. The first of these papers, which appeared in 1972, was authored by Professor Richard Fox and the views expressed in it are his rather than the Commission's.[139] For that reason, it will not be discussed here. (It should be noted, however, that the paper contains a very thorough analysis of the law in Canada as of 1972 and is therefore a very useful research tool).

The second paper published by the Commission appeared in 1975. Entitled *Limits of Criminal Law—Obscenity: A Test Case*,[140] the paper explores the question of the proper scope of criminal law, with obscenity being used as a test case. It is highly theoretical and contains very little discussion of the relevant *Code* provisions. Nevertheless, it does suggest that, in the opinion of the Commission, at least some of those provisions should be removed from the *Code*. It was appropriate, the Commission said, for the criminal law to be used to proscribe what it called "public obscenity" and to protect children.[141] What it called "private obscenity", however, should remain untouched by the criminal law (although it could be regulated in other ways).[142] Thus, adults should not be prevented by the criminal law from obtaining, and viewing or reading in the privacy of their own homes, obscene material. As the paper put it, "individuals should be free to choose their own lifestyle and society should be free to change".[143] Moreover, according to the Commission, the costs to society of criminalizing "private obscenity", including the loss of liberty and the financial costs, would outweigh the benefits.[144]

The final proposal for reform to be discussed here comes from the Bench. In his clear and thoughtful judgment in *R.* v. *Nicols*,[145] His Honour Judge Borins expressed the view that prosecutions under section 159 should not be sustained unless and until, as he put it, "a section 160 proceeding has placed a tract beyond the pale".[146] In other words, before commencing proceedings under section 159, the Crown should be required to obtain a ruling under section 160 that the material in question is "obscene". The reason for this, according to Judge Borins, lies in the vagueness of the definition of "obscene" in section 159(8). As he put it, "To condemn people to the stigma of a criminal conviction for violating standards they cannot understand, construe and apply is a serious thing to do in a nation which, by its recent *Charter of Rights*, has affirmed its dedication to fair trials and due process".[147]

It is apparent from even this brief discussion that, while there is obviously a good deal of dissatisfaction with the current *Code* provisions in this area, the reasons for the dissatisfaction differ, as do the proposals for reform. It seems clear that those within government are of the view that the law must be broadened in scope and strengthened. The Law Reform Commission of Canada, on the other hand, has suggested that the reach of the *Criminal Code* should be cut back, perhaps even drastically. And His Honour Judge Borins is of the view that the use of the major Code provision in this area, section 159, should be restricted.

Footnotes

[1] S.C. 1892, c.29. The transmission through the post of anything of an "obscene, immoral, indecent, seditious, disloyal, scurrilous or libellous" character had previously been prohibited by s. 72(27) of the *Post Office Act*, S.C. 1875, c.7. This subsection was the antecedent of the present s. 164 of the *Criminal Code*.

[2] (1868), 3 Q.B.D. 360.

[3] *Ibid.*, at 371.

[4] *R.* v. *American News* (1957), 118 C.C.C. 152 (Ont.C.A.) at 154, 157 and 161.

[5] *Ibid.*, at 157-158, but see *R.* v. *Stroll* (1951), 100 C.C.C. 171 (Que. Ct. of Sessions), at 172 and *R.* v. *National News Co.* (1953), 106 C.C.C. 26 (Ont.C.A.).

[6] *R.* v. *American News*, (1957) and *R.* v. *St. Claire* (1913), 21 C.C.C. 350 (Ont.C.A.) but see *Conway* v. *The King*, [1944] 2 D.L.R. 530 (Que.K.B.) and *R.* v. *Stroll* (1951).

[7] S.C. 1959, c.41, s. 11.

[8] W.H. Charles, "Obscene Literature and the Legal Process in Canada" (1966) 44 *Can. Bar Rev.* 243.

[9] *R.* v. *Standard News Distributors Inc.* (1960), 34 C.R. 54 (Que.Mun.Ct.) and *R.* v. *Munster* (1960), 129 C.C.C. 277 (N.S.C.A.).

[10] [1962] S.C.R. 681.

[11] Judson, Abbott and Martland, JJ. for the majority and Kerwin C.J. in dissent.

[12] Ritchie, J. for the majority and Fauteux, J. in dissent.

[13] Cartwright, J. for the majority and Taschereau, J. in dissent.

[14] Locke, J. in dissent.

[15] The cases are collected in Robert E. Lutes, "Obscenity Law in Canada" (1974) 23 *Univ. N.B.L.J.* 30, at 36 and 37.

[16] (1977), 76 D.L.R. (3d) 1. (S.C.C.)

[17] *R.* v. *Brodie* (1962).

[18] *R.* v. *Odeon Morton Theatres* (1974), 16 C.C.C. (2d) 185 (Man.C.A.).

[19] *R.* v. *Doug Rankine Co.* (1983), 9 C.C.C. (3d) 53, (Ont.Co.Ct.).

R. v. *Nicols* 27 Nov. 1984, unreported (Ont.Co.Ct.).

R. v. *Wagner*, Jan. 1985, unreported (Alta.Q.B.).

[20] *R.* v. *Brodie* (1962), at 716.

[21] (1963) 2 C.C.C. 103. This judgment was adopted in its entirety by the Supreme Court of Canada on the later appeal of the case. See [1964] S.C.R. 251.

[22] *Ibid.*, at 116.

[23] *Ibid.*, at 117.

[24] *Ibid.*, at 116-17.

[25] *R.* v. *Benjamin News* (1978), 6 C.R. (3d) 281 (Que.C.A.) at 285.

[26] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

R. v. *Towne Cinema Theatres (1975) Ltd.*, [1982] 1 W.W.R. 512 (Alta. Q.B.) Affirmed 12 May 1982, unreported (Alta.C.A.). S.C.C. reserved 28 Sept. 1983.

[27] *U. of Manitoba* v. *Deputy Minister of Revenue Canada* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.).

[28] *R.* v. *Sudbury News Services Ltd.* (1978), 39 C.C.C. (2d) 1 (Ont.C.A.) at 10.

[29] *R.* v. *Penthouse* (1979), 96 D.L.R. (3d) 735 (Ont.C.A.) at 741.

[30] *R.* v. *Doug Rankine Co.* (1983).

[31] *R.* v. *Great West News* 1970, 4 C.C.C. 2d 307 (Man.C.A.) at 315.
R. v. *Popert* (1981), 58 C.C.C. (2d) 505 (Ont.C.A.) at 508.

[32] *R.* v. *Towne Cinema Theatres* (1974).

[33] See, for example, *R.* v. *Daylight Theatre Co. Ltd.* (1973), 17 C.C.C. (2d) 451, (Sask.Dist.Ct.) at 455.

[34] *R.* v. *Doug Rankine Co.* (1983), at 58.

[35] *R.* v. *Minas Music Sales Ltd.* (1982), 109 A.P.R. 473 (N.S.Co.Ct.), *R.* v. *Wagner* (1985).

[36] *R.* v. *Doug Rankine Co.* (1983).

[37] *Re Luscher and Deputy Minister, Revenue Canada* (1983), 149 D.L.R. (3d) 243, (B.C.Co.Ct.) at 247.

[38] *R.* v. *Prairie Schooner News Ltd.* (1970), 1 C.C.C. (2d) 251 (Man.C.A.).

[39] *R.* v. *McDougall's Drug Store* (1982), 109 A.P.R. 463 (N.S.Co.Ct.).
R. v. *Cinema International* (1981), 13 Man.R. (2d) 337 (Man.Co.Ct.), affirmed, 13 Man.R. (2d) 335 (Man.C.A.).

[40] *R.* v. *Penthouse* (1979).

[41] *R.* v. *Doug Rankine Co.* (1983).

[42] *R.* v. *Towne Cinema Theatres* (1974).

[43] *R.* v. *Doug Rankine Co.* (1983), at 70.

[44] *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.).

[45] *R.* v. *Wagner* (1985).

[46] *R.* v. *Rankine Co.* (1983) at 70.

[47] *Re Luscher and Deputy Minister, Revenue Canada* (1983), at 245.

[48] *R.* v. *Saint John News Co. Ltd.* (1982), 124 A.P.R. 91 (N.B.Q.B.) at 100.

[49] *R.* v. *Harris* (1977), 43 A.P.R. 104 (N.S.Co.Ct.) and *R.* v. *Sutherland, Amitay and Bowie* (1974), 18 C.C.C. (2d) 117 (Ont.Co.Ct.).

[50] *R.* v. *Sidey* (1980), 52 C.C.C. (2d) 257 (Ont. C.A.).

[51] *R.* V. *Szunejko* (1981), 61 C.C.C. (2d) 359 (Ont. Prov. Ct.) and *R.* v. *Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.).

[52] *R.* v. *Campbell* (1974), 17 C.C.C. 2d 180 (Ont. Co. Ct.).

[53] *R.* v. *Kleppe* (1977), 35 C.C.C. (2d) 168 (Ont. Prov. Ct.).

[54] *R.* v. *Cinema International* (1981), at 342.

[55] *R.* v. *Sudbury News Services Ltd.* (1978).

[56] *R.* v. *Dorosz* (1971), 4 C.C.C. (2d) 203 (Ont.C.A.)
R. v. *Menkin* (1957), 118 C.C.C. 306 (Ont.Prov.Ct.).

[57] *Fraser et al* v. *The Queen*, [1967] 2 C.C.C. 43 (S.C.C.).
R. v. *Yip Men* (1970), 4 C.C.C. 2d 185 (B.C.Co.Ct.).

[58] *R.* v. *National News Co.* (1953), at 28.

[59] *R.* v. *Video Movieshop* (1982), 101 A.P.R. 321 (Nfld.S.C.).

[60] *R.* v. *Cameron*, [1966] 4 C.C.C. 273 (Ont.C.A.).

[61] *R.* v. *McFall* (1975), 26 C.C.C. 181 (B.C.C.A.).

[62] *R.* v. *Lee* (1971), 3 C.C.C. (2d) 306, (B.C.S.C.).

[63] *R.* v. *Video Movieshop* (1982).

[64] *R.* v. *Harris* (1977).

[65] *R.* v. *McFall* (1975).

[66] *Ibid.*

[67] *R.* v. *Odeon Morton Theatres Ltd.* (1974).

[68] *R.* v. *Kiverago* (1973) 11 C.C.C. (2d) 463, (Ont.C.A.).

[69] (1970) 3 C.C.C. 2d 149 (S.C.C.).

[70] *R.* v. *Harrison* (1973) 12 C.C.C. (2d) 26 (Alta.Prov.Ct.)

[71] *R.* v. *Vigue* (1973) 13 C.C.C. (2d) 381 (B.C.Prov.Ct.).

[72] (1982), 69 C.C.C. (2d) 503 (Ont.C.A.).

[73] *Ibid.*, at 510.

[74] (1980) 16 C.R. (3d) 87 (Ont.Prov.Ct.).

[75] R.S. McKay, "The Hicklin Rule and Judicial Censorship" (1958), 36 *Can. Bar. Rev.* 1, at 8.

[76] *R.* v. *American News* (1957), 4 at 166.

[77] *R.* v. *Cameron* (1966).

[78] *Ibid.*, at 289.

[79] (1973) 15 C.C.C. (2d) 350 (Que.C.A.).

[80] *R.* v. *Sutherland et al* (1974).

[81] *Ibid*, at p.124.

[82] *R.* v. *Penthouse Magazine* (1977) 37 C.C.C. (2d) 376 (Ont.Co.Ct.).

[83] *R.* v. *Benjamin News* (1978).

[84] *R.* v. *Nicols* (1983).

[85] *Criminal Code Amendment Act, 1938*, S.C. 1938, c. 44, s. 11

[86] S.C. 1953-54, c. 51, s.151.

[87] There is a Québec case that deals with the constitutional issue of whether a province can enact legislation dealing with the same subject matter as s. 162. See, *Hurrell v. Montréal*, [1963] Qué. P.R. 89 (S.C.).

[88] Hansard 1938, p.4315 (H.C.).

[89] Hansard 1938, p.576 (Sen.).

[90] 16 & 17 Geo. 5, c. 61 (U.K.). Some of the Australian states also copied the English provision. See, e.g., *Judicial Proceedings Reports Act*, 1958, Stats. Victoria 1958, No. 6280. There do not appear to have been any cases decided pursuant to that legislation in the Australian jurisdictions.

[91] 164 H.C. Deb. (U.K.) cols. 248-252, 2659 (1923); 165 H.C. Deb. (U.L.) col. 1155 (1923); 170 H.C. Deb. (U.K.) cols. 1193, 1886 (1924); 181 H.C. Deb. (U.K.) col 1143 (1925); 183 H.C. Deb. (U.K.) cols. 575, 2053 (1925); 184 H.C. Deb. (U.K.) col. 1738 (1925); 62 H.C. Deb. (U.K.) cols. 130-159, 528-547, 680, 687 (1925); 188 H.C. Deb. col. 186 (1925); 191 H.C. Deb. (U.K.) col. 497 (1926); 194 H.C. Deb. (U.K.) cols. 733-815 (1926); 65 H.L. Deb. (U.K. cols. 1591-1611.

[92] 194 H.C. Deb (U.K.)(1926).

[93] *Ibid.*, col. 734.

[94] *Ibid.*, col. 735.

[95] *Ibid.*

[96] *Ibid.*, cols. 733-814.

[97] *Ibid.*, cols. 749-52.

[98] *Ibid.*, col. 734.

[99] For example, *The Law of Libel (Amendment) Act*, 1888, 51-52 Vic., c. 64, s. 3; *Indecent Advertisements Act*, 1889, 52-53 Vic., c. 18; *Obscene Publications Act*, 1857, 20-21 Vic., c. 83.

[100] (1868), 3 Q.B.D. 360.

[101] [1965] 1 All E.R. 611 (Ch.Div.).

[102] Two other sections, s. 159(2)(b) and s. 171(1)(b), are relevent in this context, but neither appears to be of much significance. With respect to s. 159(2)(b), which deals with "indecent shows", see *Smith* v. *R.* (1963), 1 C.C.C. 395 (Man.Co.Ct.). With respect to s. 171(1)(b), which prohibits openly exposing an "indecent exhibition" in a public place, see *R.* v. *Boger* (1981), 61 C.C.C. (2d) 355 (Ont.Prov.Ct.).

[103] [1973] 4 W.W.R. 563 (B.C.C.A.).

[104] [1963] 2 C.C.C. 103.

[105] *R.* v. *Towne Cinema Theatres (1975) Ltd.* (1975).

[106] *Ibid.*

[107] *R.* v. *Johnson* (1973), 13 C.C.C. (2d) 402 (S.C.C.).

[108] *R.* v. *MacLean and MacLean No. 2*, (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), at 416.

[109] *Ibid.*, at 414-415.

[110] *Ibid.*, at 415.

[111] (1978), 40 C.C.C. (2d) 273 (S.C.C.).

[112] *R.* v. *Giambalvo* (1982), 70 C.C.C. (2d) 324 (Ont. C.A.). *R.* v. *Gray* (1982).

[113] (1977), 40 C.C.C. (2d) 555 (Que. C.A.).

[114] *R.* v. *Szunejko* (1980).

[115] *R.* v. *Diaz* (1981), 60 C.C.C. (2d) 39 (Ont. Prov. Ct.).

[116] *Criminal Code*, s.646(1).

[117] *Ibid.*, s.722(1).

[118] S.C. 1974-75, c.48, s.25(1) and S.C. 1978-79, c.11, s.10(1).

[119] Bill C-18, 1984, 1st Sess., 33rd Parl. (Minister of Justice).

[120] The three government bills, all of which were omnibus *Criminal Code* amendment bills, were Bill C-21, 1978, 4th Sess., 30th Parl.; Bill C-53, 1981, 1st Sess., 32nd Parl.; and Bill C-19, 1984, 2nd Sess., 32nd Parl. Each was introduced by the Minister of Justice.

[121] Bill C-434, 1978, 3rd Sess., 30th Parl. (Mr. Whiteway) and Bill C-21.

[122] Bill C-206, 1977, 3rd Sess., 30th Parl. (Mr. Epp); Bill C-207, 1977, 3rd Sess., 30th Parl. (Mr. McGrath); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-434; Bill C-21; Bill C-53. Bill C-206 has been tabled a total of four times, Bill C-207 a total of eleven times.

[123] Bill C-434, *supra*, note 121.

[124] Bill C-281, 1977, 3rd Sess., 30th Parl. (Mr. Whiteway); Bill C-325, 1977, 3rd Sess., 30th Parl. (Mrs. Appolloni); Bill C-411, 1977, 3rd Sess., 30th Parl. (Mr. Kaplan); The last of these bills has been tabled a total of four times.

[125] Bill C-207; Bill C-434; Bill C-21, *supra*, note 119; and Bill C-673, 1983, 1st Sess., 32nd Parl. (Mr. Kilgour).

[126] See in particular Bill C-673.

[127] See note 120.

[128] (1977), 76 D.L.R (3d) 1. (S.C.C.).

[129] See text accompanying notes 43, 44 and 45.

[130] House of Commons, Standing Committee on Justice and Legal Affairs, Report on Pornography, Proceeding No. 18, 3rd Sess., 30th Parl., 1977-78 (McGuigan Report).

[131] *Ibid.*, at 18-4.

[132] *Ibid.*, at 18-6.

[133] *Ibid.*

[134] *Ibid.*, at 18-9.

[135] *Ibid.*, at 18-8 and 18-9.

[136] *Ibid.*, at 18-10 and 18-11.

[137] *Ibid.*, at 18-11.

[138] *Ibid.*

[139] See R. Fox, "Obscenity" (1974) 12 *Alta. L. Rev.* 172.

[140] Law Reform Commission of Canada, Working Paper No. 10, 1975.

[141] *Ibid.*, at 48.

[142] *Ibid.*

[143] *Ibid.*

[144] *Ibid.*, at 49.

[145] *R.* v. *Nichols* 27 Nov. 1984, unreported (Ont.Co.Ct.).

[146] *Ibid.*, at 16.

[147] *Ibid.*, at 16-17

Chapter 8

Pornography and the Charter of Rights and Freedoms

Canadian courts have already had the opportunity to consider pornography in the context of the *Charter* so that it is possible to develop at least a tentative picture of the directions in which they seem to be moving.

For the purposes of our discussion, the relevant sections of the *Charter* are sections 1, 2, 7, 8 and 15:

> ***Guarantee of Rights and Freedoms***
>
> 1. *The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by-law as can be demonstrably justified in a free and democratic society.
>
> ***Fundamental Freedoms***
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.
>
> ***Legal Rights***
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 8. Everyone has the right to be secure against unreasonable search or seizure.
>
> ***Equality Rights***
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In every one of the challenges that have thus far been brought against legislation in this area, the focus has been on the "freedom of expression" component of section 2(b). These challenges have raised one or more of the following issues in respect of that freedom:

(1) Does the legislation in question constitute a *prima facie* infringement on "freedom of expression"?

(2) If so, is the infringement cast in language so open-ended or vague as to offend either the "prescribed by law" requirement in section 1 or the "principles of fundamental justice" requirement in section 7?

(3) If so, can the infringement be justified in accordance with the requirements of section 1?

Considerable light can be shed on the kinds of constraints the *Charter* imposes in this area by examining how the courts have dealt with each of these issues.

Experience thus far would suggest that most Canadian courts are prepared to acknowledge that legislation that restricts obscene or indecent speech does constitute an infringement on the freedom of expression guaranteed in the *Charter*. More often than not this acknowledgement has been implicit rather than explicit[1] but on occasion it has been explicit.[2] Some courts, however, have not been prepared to acknowledge that the freedom of expression guaranteed by section 2(b) is put at risk by legislation directed at obscene or indecent speech.[3] These courts have opted for the American approach in this area, which, as we will see in a later chapter, involves holding that obscenity is not protected by the First Amendment to their Constitution. The question of which of these two approaches is the correct one will obviously have to await a Supreme Court of Canada ruling before it is finally resolved.

With respect to the requirement that an infringement on freedom of expression be "prescribed by law", the Ontario Court of Appeal has made it clear that the granting to an administrative agency of unbridled powers of censorship over a particular medium will not pass muster.[4] Some limits on those powers must be set and some criteria for their exercise spelled out.

However, no court has yet been prepared to hold that the vagueness inherent in the legislation in this area is sufficiently serious to warrant holding that the limits on freedom of expression embodied in it are unconstitutional. In *Luscher* v. *Deputy Minister, Revenue Canada, Customs and Excise*[5], the judge rejected the argument that the "immoral or indecent" test in Tariff Item 99201-1 of Schedule "C" of the *Customs Tariff* failed to satisfy the "prescribed by law" requirement. And a similar argument in respect of section 159(8) of the *Criminal Code* has now been rejected in at least three cases.[6] It would appear, therefore, that Canadian courts are prepared to give a good deal of leeway to the legislative draftsman in this area.

Few courts have had occasion to address the third of the three issues listed above, that dealing with the acceptability of the rationale for the limitation on freedom of expression. In some cases, counsel for the challengers have chosen to concede this issue. In others, the issue was not before the court at all. However, in the four cases in which the court has been required to deal with the issue, it has been quick to find that the limitation in question could be justified under section 1.[7]

It is of interest to note that the judge in another case, one in which the issue did not have to be addressed, took a cautiously activist position. In *University of Manitoba* v. *Deputy Minister, Revenue Canada, Customs and Excise*,[8] the judge expressed the view that preventing a university from importing for educational purposes a short film of a male masturbating could not be justified under section 1.

In the *Luscher* case, counsel for the appellant invoked both section 7 and section 8 of the *Charter*, in addition to section 2(b), in his attempt to have Tariff Item 99201-1 declared unconstitutional. It is not clear from the reasons for judgment just what form the section 7 argument took, but it would appear that it was the "liberty" component of section 7 that was relied upon. Whatever form the argument took, it received short shrift from the court. The judge was of the view that what Mr. Luscher was really complaining about was a loss of his property, specifically a magazine, at the border, and he noted that the drafters of the *Charter* had intentionally decided not to include any protection for property rights in Section 7. In other words, he was not prepared to construe the right to "liberty" in section 7 in such a way as to bring within its reach a right to property.

The argument based on section 8 was very straightforward. The contention was that the refusal of the Customs Officer to allow Mr. Luscher to bring his magazine across the border amounted to an "unreasonable seizure" of that magazine. The judge questioned whether or not a "seizure" could properly be said to have taken place in the circumstances, but seemed prepared to assume that it had. The real issue, he said, was whether or not the seizure was "unreasonable". He decided it was not. It was his view that legislation that was designed to prevent what he called "socially offensive material" from coming into Canada satisfied the requirements of section 1.

On the basis of this brief review, it is possible to venture some opinions about the kinds of constraints the *Charter* might impose on legislators attempting to deal with pornography. The discussion that follows is organized in terms of the kinds of arguments that one might expect to be launched against legislation in this area. The opinions that are expressed are, of necessity, very general in nature.

Providing the legislation in this area is reasonably narrowly drawn, we cannot see Canadian courts striking it down on the basis of freedom of expression. Either our courts will follow the American lead and hold that a certain category of pornographic speech falls outside the scope of section 2(b) of the *Charter* (something which, as noted above, a couple of our courts have already done), or they will uphold the legislation on the basis of section 1. It seems clear that Canadian courts see very little redeeming value in pornographic material. Morever, we sense that our courts are prepared to attach considerable importance to the purposes underlying legislation in this area. This will be especially true if those purposes are formulated in the terms of the need to respond to real social harms such as promoting violence against women and children and encouraging discrimination against women. In this regard, note should be taken of the recent decision in the case of *Regina* v. *Keegstra*.[9] In that case, an argument was made that the hate propaganda section of the *Criminal Code* was unconstitutional because of the effect it had on freedom of expression. In the course of rejecting that argument, the court placed great emphasis on the entrenchment in the *Charter* of the right to equality. It was appropriate, the court said, to limit freedom of expression for the purpose of promoting the goal of equality.

The decision of the Ontario Court of Appeal regarding the need to provide reasonably clear guidelines to a censorship body is obviously an important one. Failure to provide such guidelines will result in the body losing its powers.

Legislative drafters in this area must, of course, be concerned to some extent about arguments based on the doctrine of vagueness. However, experience both in the United States and in Canada would suggest that courts will not require a great deal of precision in the formulation of the legislative standards that are imposed. The courts in both countries seem to acknowledge the difficulty legislators face in this area.

Arguments based on property rights are unlikely to get very far at all. As the *Luscher* case points out, the *Charter* makes no mention of property rights, and it is not going to be easy to persuade a court to read them into some other provision.

If possession of certain material for personal use were to be made an offence, there can be little doubt that a right to privacy challenge would be forthcoming. In order to succeed in such a challenge, it would, or course, be necessary to establish that such a right exists. And that, we are led to believe, would be no easy task. Even if the courts were prepared to accept that such a right exists, and that the offence of possession for personal use infringed upon that right, they might still be prepared to uphold the legislation on the basis of section 1. One suspects that they would require good reasons to be given in support of the need for such an offence, but if, as one could persuasively argue, the harm caused by pornography stems from its impact on the consumer, that might well be sufficient.

We doubt very much that section 15(1) would ever be used by the courts to strike down legislation in the area of pornography. While such legislation will no doubt be found to contain inequalities, in the sense that it will treat some groups differently than others, these inequalities are unlikely to bother the courts a great deal. Even if it could be argued that the producers, sellers and consumers of pornography constitute a group suffering some form of discrimination, it is doubtful whether the courts would evince any sympathy for them. As the *Keegstra* case suggests, the role that section 15(1) is more likely to play in this area is that of a justification for legislation directed against pornography.

The *Luscher* case indicates that section 8 of the *Charter* is likely to be used by challengers in this area. Although the argument in that particular case was not successful, section 8 has been used to good effect in a number of *Charter* cases thus far. The most important of these is *Southam Inc.* v. *Hunter*,[10] a recent decision of the Supreme Court of Canada. In that case the Court held that, as a general rule, searches and seizures can only be conducted pursuant to warrants issued by an impartial and independent person on the basis of evidence given on oath. This pronouncement has put at risk many existing search and seizure provisions in provincial and federal legislation alike, and drafters of any new legislation will obviously have to be mindful of it.

It is clear that the existing provisions of the *Customs Act* would not meet the standard prescribed by the *Southam* case. It appears, however that searches and seizures conducted pursuant to customs legislation are viewed as a special case, and that the general rule would, therefore, not apply.[11] The likelihood is, therefore, that, provided Customs Officers do not abuse their powers, the existing provisions will satisfy the *Charter*.

To date, despite the background of liberalization of the application of obscenity law in recent decades, the courts have used the *Charter* very carefully. Indeed, the signs are that they are prepared to take seriously the task of balancing individual rights and social concerns, and to pay attention to other community members' rights which are at the root of the broader social concern with pornography.

Footnotes

[1] *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors* (1983), 34 C.R. (3d) 73 (Ont.Div.Ct.), affirmed (1984), 5 D.L.R. (4th) 766 (Ont.C.A.); *University of Manitoba* v. *Deputy Minister, Revenue Canada, Customs & Excise* (1983), 4 D.L.R. (4th) 658 (Man. Co. Ct.); *R.* v. *Red Hot Video* (1984), 11 C.C.C. (3d) 389 (B.C.Co.Ct.) *Re Red Hot Video and City of Vancouver* (1983), 5 D.L.R. (4th) 61 (B.C.S.C.) reversed on other grounds by the B.C.C.A. in short oral reasons given in February, 1985.

[2] *Luscher* v. *Deputy Minister, Revenue Canada, Customs & Excise* (1983), 149 D.L.R. (3d) 243 (B.C.Co.Ct.); *R.* v. *Wagner* (unreported, 16 January 1985, Alta. Q.B.).

[3] See *Koumoudouros* v. *Corporation of the Municipality of Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.); *Schindler* v. *Deputy Minister, Revenue Canada, Customs and Excise* (unreported, 1983, Ont.Co.Ct.).

[4] *Ontario Film and Video Appreciation Society* v. *Ontario Board of Censors, supra*, note 1.

[5] Supra, note 2.

[6] *R.* v. *Red Hot Video, supra*, note 1; *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man.Q.B.); *R.* v. *Wagner, supra*, note 2.

[7] *Luscher* v. *Deputy Minister, Revenue Canada, Customs & Excise, supra*, note 2; *Re Red Hot Video and City of Vancouver, supra*, note 1; *R.* v. *Ramsingh, supra*, note 6; and *R.* v. *Wagner*, supra, note 2.

[8] *Supra*, note 1.

[9] Unreported, 5 Nov. 1984, Alta.Q.B.

[10] (1984), 11 D.L.R. (4th) 641 (S.C.C.).

[11] *R.* v. *Simmons* (1984), 7 D.L.R. (4th) 719 (Ont.C.A.)

Chapter 9

Canada Customs

1. Introduction

There exist a variety of federal legislative provisions that attempt to prohibit or regulate the distribution of what we can conveniently describe as pornographic material. The legislation has both general and particular application.

Various departments of the federal government have such provisions in their enabling legislation. In addition, there are complementary provisions of the *Criminal Code.*

Not only are there different legislative descriptions of what kind of material is affected; the different descriptions are not even defined in the legislation. As a result, the different descriptions have been the subject of conflicting judicial comments and decisions and have, understandably, led to considerable administrative grief.

We have identified three significant service areas where federal legislation is used to attempt to regulate pornographic material. These areas are the Customs, Postal and Broadcasting services.

As we have indicated elsewhere in this Report, the overwhelming majority of pornographic material available in Canada is produced in other countries. The methods we have or can devise to control the importation of such material into this country are, therefore, of obvious importance.

The Customs and the Postal services respectively have responsibility for goods and mail entering Canada. Their jurisdiction, to an extent, overlaps. After describing their independent roles and respective procedures, we will deal with their joint jurisdiction. The Broadcasting service will be dealt with separately.

2. Customs Tariff and Customs Act

Federal Customs legislation is found in two Statutes: the *Customs Act*[1] and *Customs Tariff*[2].

The *Customs Act* contains the substantial powers given to the Customs Branch of Revenue Canada. It also gives decision-making power to Customs officers in a variety of areas and provides a regime for appeals.

The *Customs Tariff* sets out in great detail the various tariffs and the rates of duties of Customs which Canada applies to goods imported from other countries. There are three Schedules to the *Customs Tariff*, Schedule A, "Goods Subject to Duty and Free Goods", Schedule B, "Goods Subject to Drawback for Home Consumption" and Schedule C, "Prohibited Goods".

All goods entering Canada are subject to examination by Customs officers for appropriate classification under the *Customs Tariff*. Under Section 14 of the *Tariff*, it is prohibited to import goods set out in Schedule "C"; these goods include, "books, printed paper, drawings, paintings, prints, photographs or representations of any kind of treasonable or seditious, or of an immoral or indecent character". (Tariff Item 99201-1).

In May 1980, the then Minister of National Revenue gave this general explanation to members of both Houses of Parliament of how Canada Customs administers its legislation in order to deal with pornographic material:

> As with all goods entering the country, importations of items of this nature are subject to examination by Customs officers at the ports of entry for appropriate classification under the *Customs Tariff*. If, in the judgment of the examining officer, the importation constitutes explicit pornography, and is thus of an indecent character, it is classified under tariff item 99201-1 and, therefore, prohibited entry. All doubtful items are forwarded to Ottawa where they are reviewed by departmental officers and, if found to fall under the provisions of the item, they are declared prohibited importations. The decisions are then communicated to the Collector of Customs who, in turn, advises the importer accordingly. The importer is also notified of his statutory right of appeal to the Deputy Minister (section 46 of the Customs Act) for a reclassification of the goods. Should the appeal be denied, the importer can further appeal to the judge of the county or district court as provided by section 50 of the *Customs Act*. The final decision, then, rests with the courts and not Canada Customs.
>
> Canada Customs does not censor importations in the sense of deleting portions of films or magazines, or set age limitations for their viewing or purchase. Rather, the role is one of determining whether specific items are to be classified under tariff item 99201-1.
>
> The criteria used for determining the admissibility of those items considered susceptible to the tariff item are based on the related sections of the *Criminal Code* which deal with "obscene" matters and on court decisions made under the *Criminal Code* and under the *Customs Act*. Since the administration reflects the standards of the community at large, these criteria, which are

> national rather than local, have changed over the years and certain magazines which might have been prohibited in the past as indecent are now admitted. To assist examiners in this classification at the port level, guidelines have been issued, ... and, in addition, decisions made by Headquarters are circulated to Customs Regions at two-week intervals.

In order to assist its officers in the field to decide if particular goods are "of an immoral or indecent character" and, therefore, prohibited, the department issued so-called "policy guidelines". These guidelines have not been formally revised since October, 1977 and are as follows:

> *Policy Guidelines*
>
> 9. (1) In its formulation of the policy governing the administration of this item the Department is guided by the decisions handed down by the Canadian Courts and by the definition of obscenity contained in Section 159(8) of the *Criminal Code* ... :
>
> (2) For the purpose of assisting field officers in making judgments, the following guidelines are to be followed:
>
> The following material will be dealt with at field level for initial classification and will be prohibited:
>
> (i) illustrated material containing hard-core pornographic pictures which lewdly and explicitly display the male and female sexual organs, sexual intercourse, sexual perversions and such acts, including bestiality.
>
> (ii) Reading material, containing explicit hard-core fictional text dedicated entirely to sexual exploitation and containing no redeeming features. The primary source of material of this character is the paper-back, or so called "pocket" publications.
>
> The following material will be referred to headquarters for initial classification:
>
> (iii) That type of material, the so-called "grey area", with illustrations depicting similar subjects to those described in 9(2)(i) but in a less explicit fashion, with emphasis, however, mainly on sexual activities and apparently designed to appeal in the same way as hard-core pornography. In this category are the pseudo or so-called "Nudist" and "Film" magazines which make pretensions to being bona fide but which include lewd or other pornographic displays.
>
> (iv) Any publication which despite its format or alleged scientific, medical or artistic purpose appears to be in essence an indecent or immoral publication in disguise. ...
>
> (vii) Any publication which appears to advocate, promote or incite hatred against any identifiable group, that is, by colour, race, religion or ethnic origin.
>
> (viii) Any publication concerned with violence which counsels, appears to incite, advises, recommends or persuades persons to commit acts of violence which are prohibited by the *Criminal Code*.
>
> Generally speaking, items which do not fall within the foregoing categories may be allowed to be imported including the so-called "naughty" or "spicy" girlie type magazines where the models are partially clad so that the genitals are not exposed and perversions are not depicted. Cultural and educational publications and bona fide nudist magazines, although illustrated with nude males or females but not including indecent poses or over-emphasis of the sexual organs, are also considered admissible. Non-illustrated fictional

> reading material (or with inoffensive illustrations) which does not fall in the category of hard-core pornography described in 9(2)(ii) should be allowed to be imported. It is thus the policy to prohibit only hard-core material of the latter type and this will be done at the field level. In case of doubt the material may be forwarded to headquarters for guidance.

The fact that the "Policy Guidelines" have not been revised for several years does not mean that the department has treated what is contained in them as immutable. There have been a great number of information bulletins and internal memoranda circulated within the Customs Branch, designed to update information and data both about inspection policy and actual decisions on material.

In describing the process they follow in dealing with pornographic materials, Customs has told us that the material is brought into Canada by visitors, returning residents, magazine and film distributors, research and scientific groups and institutions. All methods of transport are used, including the mail.

While there were only 70 actual seizures of pornographic material in 1983, it must be recorded that seizure is the ultimate procedure taken under the *Act* and that, while no actual records exist, it is well known that there were a large number of both confiscations and voluntary releases.

In dealing with commercial shipments of magazines, the department fosters a system of so-called "voluntary compliance", whereby a distributor can provide Customs with a single copy and obtain an advance ruling on the admissibility of an entire shipment. As one might expect, distributors of large commercial shipments take advantage of the procedure as a saving both in time and expense against the possibility of an ultimate finding that the goods are prohibited.

No administrative or service fee is charged at the time goods are cleared, either in advance or in the ordinary course.

Field officers can decide on the admissibility of material, or they can forward the material to the appropriate regional office. There, an officer referred to as a "commodity specialist" makes the decision based on the department's policy guidelines. The department concedes that not all officers and all regions are applying the policy guidelines in a uniform manner. Clearly this results both from the fact that the guidelines themselves are imprecise and also from the fact that the people making the decisions may have genuine disagreements.

Commodity specialists within the department receive "on the job training". They are usually officers already experienced in the department who take their turn dealing with pornographic material. We understand that the present Minister has asked that a review be undertaken of training programs available to both field officers and commodity specialists.

The task of the regional commodity specialists includes a number of clerical functions, and in the absence of any computer assistance, the entry and retrieval of data is a time-consuming, inefficient, inexact and slow process. In terms of the equipment it has, the department is not only unable to efficiently deal with its work load, but it is also unable, in a timely fashion, to keep itself well informed of its own decisions.

The department agrees and has told us that:

> The capture, storage and retrieval of information relating to attempted importations of immoral or indecent materials are currently inadequate. The system does not provide sufficient information for a complete and accurate data base, which could serve future investigations. The system is being developed to overcome this problem.

The department now issues a monthly list of the material that has been prohibited. The list typically runs to about 80 pages and is updated each month. While each of the Customs officers nationwide does not receive a copy of the list, each has access to the information. As we understand it, however, the Department has no separate computer facilities and competes with other government departments for computer time. The computer information flow appears to be from Ottawa headquarters to the regions. There is no computer information flow from the regions to Ottawa.

As the former Minister indicated in the passage set out earlier, generally describing the Customs process, an importer can appeal a determination classifying goods as being "prohibited" at the time of their entry. The initial appeal is to a Dominion Customs Appraiser and must be taken within 90 days. A subsequent appeal to the Deputy Minister of Revenue Canada must be taken within 90 days. No administration fees are payable with respect to these appeals. An appeal from the Deputy Minister of Revenue Canada lies to either the county or district court depending on the province where the matter arises.

The volume of appeals to the Deputy Minister is considerable. The following table contains the most current data available to us showing the disposition of appeals to the Deputy Minister for the first six months of 1984.

As the figures show, the overwhelming majority of cases arose as a result of material that had been sent through the mail. Of the total 223 appeals, 61 were successful or partially successful.

We do not have any information about the number of cases that went on to appeal in the courts.

If the "Policy Guidelines" and the related documentation we have referred to earlier, have been used by Canada Customs to give effect to goods that are "of an indecent or immoral character", what interpretation have the Courts given to the term?

Generally speaking, the courts have held that the contemporary community standards of tolerance is the test to be applied.[3] However, there

	PROHIBITED		RELEASED		PARTIALLY RELEASED			
DECISION	# of cases	# of items	# of cases	# of items	Total # cases	Total # items	Prohibited items	Released items
DATE					NON-MAIL			
January 84	2	5	—	—	0	0	0	0
February 84	2	9	—	—	0	0	0	0
March 84	2	5	—	—	3	3	2	1
April 84	3	22	—	—	0	0	0	0
May 84	0	0	—	—	1	22	21	1
June 84	2	11	—	—	2	78	74	4
TOTAL	11	52	—	—	6	103	97	6
					MAIL			
January 84	54	196	8	14	22	284	213	71
February 84	25	122	4	6	0	0	0	0
March 84	45	226	5	27	5	23	17	6
April 84	25	87	2	5	3	36	22	14
May 84	38	260	1	1	1	6	5	1
June 84	25	140	2	3	2	31	25	6
TOTAL	212	1,031	22	56	33	380	282	98
					TOTAL			
January 84	56	201	8	14	22	284	213	71
February 84	27	131	4	6	0	0	0	0
March 84	47	231	5	27	8	26	19	7
April 84	28	109	2	5	3	36	22	14
May 84	38	260	1	1	2	28	26	2
June 84	27	151	2	3	4	109	99	10
TOTAL	223	1,083	22	56	39	483	379	104

remains some confusion surrounding the precise nature of this test. For example, in *Priape Engineering et al* v. *Deputy Minister of Revenue Canada*[4] the court expressed the view that, while indecency and immorality suggest a similar standard, this standard might differ from the test for obscenity under section 159(8) of the *Code*, with "obscene" slightly higher on the scale of unacceptability than "immoral or indecent". If this interpretation is correct, it is possible that goods may be prohibited under the *Customs Tariff* which would not be illegal under the *Code*.

On the other hand, there have been cases where goods allowed through Customs have been found to be "obscene" under the *Code*.[5]

These apparently conflicting decisions illustrate the difficulties that are inherent when different legislation uses different words in attempting to deal with what some regard as qualitatively the same material.

A new and further complication in the administration of Customs has arisen as a result of the 1983 decision of the County Court of Manitoba in the *University of Manitoba* v. *Revenue Canada*.[6] The court held that material sought to be imported by the University's medical faculty was not prohibited as being "immoral or indecent" because it had been produced for a *bona fide* medical teaching institution. The result of this decision is that Customs must now, in effect, consider the *use* to which the material is to be put in order to decide whether or not it should be prohibited.

3. Incidental Customs Data

Our discussions with the Deputy Minister of Revenue Canada Customs and Excise and his officials have been comprehensive and very helpful. They have enabled us to put into some perspective the administrative problems that surround controlling the mass of material that enters Canada each year. There are approximately 400 ports of entry and 12 regional administrative Customs offices in Canada, staffed by between 2,500 and 3,000 Customs officers. Eighty million individuals entered Canada in 1983, half were visitors and half were returning Canadians. During the period March 31, 1982 to April 1, 1983, approximately 6.5 million commercial shipments and approximately 13.5 million pieces of mail entered Canada.

While Customs deals with a huge volume of material, it is clear from their experience that only a portion of goods brought into Canada is actually declared.

It is estimated that Customs officers actually inspect the luggage of approximately 7% of those persons entering Canada. Of the commercial shipments processed through Customs at the moment, about 5% of the material is actually examined. We understand that these statistics are a direct function of both time and available resources as well as assigned priority.

The resources of the Customs Branch are, of course, at the disposal of the federal government. Accordingly, Customs' priorities are subject to political will. At various times in the recent past, Customs received instructions to make *Tariff* items involving clothing and automobiles an administrative priority. No special priority has been ordered with respect to pornographic material. Among other things, the lack of political will has impacted on the treatment Customs has been able to give to the importation of pornographic material.

Canada Customs estimates the current sources of pornographic material in this country are: the United States 85%, Europe 12% and domestic 3%. In their experience, the material comes in the form of books, magazines, pictures, sound recordings, video cassettes, movie films, computer games and television transmissions received by satellite dishes. The material appears to be increasingly explicit and violent. Pornography involving children seems to be well hidden and is not frequently encountered by Customs officers. While the department does not keep statistics on the likely dollar value of the prohibited goods, it agrees that the figure is probably in the tens of millions of dollars annually.

It is estimated that there are now approximately 400,000 privately owned video cassette recorders in Canada. The sales and rental figures for pornographic videotapes are not available, but even adopting the most conservative estimate, there is a ready market. The vast majority of original tapes are produced in the United States. The supply of tapes in the Canadian marketplace must, therefore, either have been imported from the United States or other of the producing countries, or have been copied in Canada from the originals. From what we can tell, the original tapes are not being cleared by Canada Customs. However, the foreign produced material abounds in Canadian video stores.

Red Hot Video is a British Columbia concern with stores in seven cities in that province. It advertises itself as Canada's leading supplier of "adult videotapes" and claims that its features are "uncut and sexually explicit". Its 1984 adult video catalogue lists 295 titles. The Pacific Region of Canada Customs advises us that it has never received an application by Red Hot Video to clear material under the *Customs Tariff*. The source of the company's supplies is apparently unknown, yet it is clear that most, if not all, of their products are produced outside of Canada.

Customs is aware that large quantities of empty tape boxes have been shipped from the United States to destinations in Canada. The empty boxes are themselves not in violation of the *Tariff*. The covers advertise known pornographic titles. The advertised tapes have not been included in the shipments. One of the inferences that can be drawn is that the actual tapes have been relabelled with false titles and have reached Canada undetected. The relabelling of tapes is a common service provided by some American video shops selling to Canadian customers who wish to avoid a Customs declaration.

We have seen evidence that pornographic material is being transmitted via satellite to Canada. There is widespread belief that the material is then rerecorded here for distribution. We, in Canada, have not given much thought to how our existing Customs legislation and administrative procedures can be amended to accommodate the consequences of this technology.

4. Film and Video Material

The present Canadian regime for dealing with imported film material has divided jurisdiction between federal Customs and provincial film classification boards. Customs clears the material into the country and the boards classify it where it is intended for public showing. In other countries, and in some other federal states, Customs has the complete jurisdiction to admit and to classify films. The efficiency of such a system is matched by its obvious consistency.

In the course of our public hearings, there were suggestions that only Canada Customs be given the responsibility for the classification of films as part of its clearance procedure. It was pointed out that the standards of classification boards vary across the country and that not only are the results inconsistent for the viewing public, but distributors face a multiplicity of bureaucracies if they wish to show a film in all parts of Canada.

The current Canadian practice appears to have developed for a variety of reasons. One reason has to do with our Constitution. Parliament has the power to control Customs. Provincial legislatures have the power to regulate local business undertakings, including the public showing of films.[7] It is an open question whether the federal power would extend to having films classified as part of the Customs process, but there is reason to doubt that it would.

Another reason for the existing practice has to do with Canada's cultural and regional diversity. Canada's experience has traditionally been that very little, if anything, can be treated monolithically. The creative expression of our cultural diversity has proceeded along regional and linguistic lines. The classification of films by provincial or regional bodies has been a part of this tradition. We have celebrated our regional diversity in Canada. It is part of what we think unites rather than divides the country and it is difficult to imagine that any proposal to do away with the provincial film classification boards would be viewed as a recommendation for progress.

Just as important, perhaps, is the view that it is not and should not be the role of Customs to act as arbiter of the public taste. It is thought by many that the role of Customs should be confined to a determination of whether goods should be prohibited entry on the basis of a standard that is really little more than an objective formula. Many people believe that to extend the function of Customs to include a determination of what material is publicly acceptable, would be to give it a role it should not have.

A more complete description of the existing various provincial film classification procedures appears in Chapter 14 of this section. Suffice it to say that all the provinces and both territories have either established a classification board or made arrangements to use the services of a provincial board. All films must be classified if they are intended for public showing in a province or territory.

The importer of films for public showing has two hurdles to leap. Firstly, the film must be cleared by Customs and secondly, before it can be shown, the film must be classified. For an importer, there is little point in obtaining Customs clearance if a film is ultimately refused provincial classification.

As a practical response to this dilemma, there has developed a long standing practice of co-operation between Customs and the provincial classifiers. The political nature of the co-operation differs from province to province, however.

In Québec, as previously discussed, a practice has developed over the last 20 years whereby Customs allows importers 60 days in which to have a film approved by the classification board. If the film is approved, then clearance by Customs follows, otherwise the film will be prohibited. One of the aspects of this self-regulating arrangement that has attracted criticism is the fact that the importer is given possession of the film for the purpose of conveying it to the board. The possibility clearly exists that, while the material is out of the control of Customs, it may be copied and then distributed in its original form. It is clear that the technology now exists to copy the material onto video cassettes. We were told that such video cassettes are in wide circulation despite the fact that original versions of the films were rejected by both the classification board and Customs. The existing practice involving the so-called "60 day rule" appears to be a vehicle that can make a nonsense of the whole regime of Customs inspection.

In British Columbia, there is currently a written agreement providing for Customs to forward directly to the classification board films destined for public viewing in theatres, bars or discos. After the board has reviewed and rated the film and made any cuts, it is returned to Customs for appropriate action, namely, release or prohibition or destruction by the importer. An important feature of the arrangement is that the film remains under continuous Customs control. Under the arrangement, Customs does not delegate away its responsibility under the Customs legislation. Customs retains its ultimate jurisdiction to give clearance to a film, but its decision to do so is based on the informed report received from the classification board.

Customs has proposed that a similar formal arrangement be made with the other seven provincial classification boards. It is proposed that the arrangement extend to all so-called "commercial films", i.e. films intended for public viewing, including 8 mm., 16mm. and 35mm. film as well as video cassettes and slides. Customs has indicated that the scope of the proposal will not extend to "recognized movie chains" though the possibility of so extending it is left open.

The procedure contemplated has these significant aspects:

(a) Customs makes an immediate decision on whether the film is intended for public showing;

(b) If the decision is affirmative, the importer is advised that he can either have the film returned to the sender or it can be forwarded to the provincial classification board under Customs control;

(c) If the importer elects to have the film forwarded to the board, it will view and classify the film and contact the importer to explain if any portions must be cut. The cuts will only be made if the importer agrees. If there is agreement, the cut film will then be returned to Customs for release to the importer. If there is not agreement, the film will be exported or destroyed under Customs supervision as the importer wishes;

(d) "Customs will retain the right to view and classify for Customs entry purposes any commercial film and may do so in exceptional circumstances".

We understand that New Brunswick, Ontario and Saskatchewan have joined British Columbia in agreeing with the arrangement and that it will become effective in these provinces on April 1, 1985. The provinces of Nova Scotia, Manitoba and Alberta are still considering the proposal.

In Chapter 14 dealing with film classification, we express our views on the efficacy of the different methods of classification. Regardless of the classification method employed, it is clear that co-operation between Customs and classification boards is both sensible and, on an ongoing basis, essential.

5. Enforcement

Canada Customs has exclusive jurisdiction to interdict goods at its border ports. Earlier in this century the Department of National Revenue, which administers Customs, had its own "Preventive Service" to investigate smugglers and smuggling. In 1932, the Preventive Service was transferred to the Royal Canadian Mounted Police (RCMP), with the Ministry of National Revenue being given responsibility "for the policy to be adopted by the Preventive Service". The Ministry of Justice was given responsibility "for the administration of the personnel of the Preventive Service, and of the duties and interior economy of that service."[8]

There are currently 52 field sections of the RCMP located in various centres across Canada and dedicated to all aspects of Customs enforcement; 214 positions exist in the 52 sections. The members of the force employed in the Customs and Excise sections are experienced officers who receive specialized training in Customs enforcement and whose responsibilities include all aspects of enforcement. Accordingly, none of the officers is exclusively committed to dealing with pornographic material.

The RCMP and Revenue Canada have written agreements that came into force in September 1983, with respect to both Customs prosecution policy and the division of investigative and enforcement responsibilities. Customs has responsibility for investigation and enforcement activity with respect to the

Customs Tariff. The RCMP has responsibility under the agreement for the *Customs Act*, and as the agreement records, for:

> Investigation of suspected smuggling where the goods have been imported into Canada at a place where no Customs office is located, or, the goods have been carried past a Customs office and ... were not included in any shipment formally entered at Customs.

The RCMP is also given responsibility for:

> Investigation of offences which come to the attention of the RCMP as a result of an investigation of other criminal activities which would normally be the responsibility of Customs.

Under the terms of their agreement, co-ordinating committees of both Customs and the RCMP have been established in their respective regions and headquarters.

There are a number of offences created by the *Customs Act*. Among them are smuggling, concealing goods on one's person, making a false statement in a declaration, and keeping or selling goods unlawfully imported. Generally speaking, the present *Act* provides for seizure and forfeiture of the goods, forfeiture of the value of the goods and fines, as well as terms of imprisonment. The first two of these sanctions are usually mandatory. The third is imposed only if a criminal prosecution is launched.

With respect to the fines and terms of imprisonment, a distinction is drawn between cases involving goods with a dutiable value of less than $200 and cases involving goods with a dutiable value of $200 or more. (That is some indication of how old the legislation is.) Penalties are nominal if the goods have a dutiable value of less than $200, and they are not much more severe if the value of the goods equals or exceeds $200.

The importation of prohibited goods results in the goods being forfeited to the Crown. In addition, the importer "shall for such offence incur a penalty not exceeding $200."

Most of the investigatory work done by the RCMP is undertaken by the force as a result of intelligence and information it has received from sources apart from Canada Customs. In this sense, the force's role is pro-active. Only a minor part of its work is reactive in the sense of acting on information received from Canada Customs.

The RCMP represents Canada in Interpol and operates Canada's National Central Bureau which links 135 countries in a system for communicating information likely to assist in preventing and suppressing crime. The National Central Bureau links the world police network with Canada's police forces and law enforcement agencies. Through the Interpol network, information on pornography is collected and disseminated to police forces and law enforcement agencies including Canada Customs.

Customs is a member of the Customs Co-operation Council, an international organization involving some 97 countries through which Customs information is exchanged. Through this mechanism, pertinent information is made available to the RCMP.

6. Computer and Information Services

In 1974, the RCMP established an Automated Intelligence Customs Services System (AICS) in order to provide a data base for Customs related information. Canada Customs commenced using this service in 1975. The system was originally set up to monitor large commodity shipments in an effort to counteract the activities of organized crime and commercial smuggling. As time went on, the RCMP noticed that information about smaller shipments was useful in identifying trends and in collating sources and destinations to assist in the investigation of smuggling activities. The data base was, therefore, expanded.

The AICS system was originally a "batch type" system and information was received from it by paper printout. The information that could be retrieved from the system included composite seizure statistics and information about where commodities had originated and their points of destination.

The report of the Badgley Committee has made recommendations about this information system. The report identified that about two of every five postal detentions made by Canada Customs were not included in the AICS system. Since the Badgley recommendations, Canada Customs has started providing more frequent information to AICS and has begun to provide the system with more details about both the nature and origin of goods in specific shipments.

A new and automated Police Information Retrieval System (PIRS) is now in use. This system, which is owned by the RCMP, originated in British Columbia and is in the process of being expanded to other major centres across the country. The information that is now on the AICS system will be put on the new retrieval system by June of 1985. In November of 1984, the RCMP signed a Memorandum of Understanding with Canada Customs providing for direct input into the system by both sources and agreeing that there would be continuing sharing of information.

PIRS is an "on-line" system and information will be able to be retrieved from it quickly by video screen. Under the existing "batch type" AICS system, a commodity specialist in any Customs office across Canada can access information by telephone either through the regional office or the national headquarters. Information retrieval will be much easier under the new on-line system. The amount of information will be greatly increased to include the following:

1. the route that the commodity took and how it came into Canada, including intermediate ports;

2. how the commodity was concealed;
3. where the commodity came from;
4. destination;
5. the name and address of the sender and receiver;
6. commodity type; and
7. the licence number and the name of the owner of any vehicles, vessels or aircraft involved in the transport of the commodity.

At the present time, the titles of pornographic materials are not included in the data base, nor is it proposed to include this information in the enlarged on-line data base. This is essentially because titles change frequently and regularly, in an apparent attempt to avoid detection.

The information concerning the material will stay in the data base until there has been a ruling on the material by Canada Customs. If it is deemed to be "immoral or indecent", the information about the material will remain on the data base. If it is found not to be "immoral or indecent", then the information about the material will be purged from the data base, unless it has not been declared at the time it was brought into the country and can, therefore, be treated as having been smuggled.

Information which remains on the data base is information about material that has either been found to be in violation of the *Customs Act* or the *Customs Tariff*. Information does not remain in the data base about material that has either been judged not to be in violation of the *Customs Tariff* or been properly declared.

Unless the operation is being conducted partially or totally undercover, the RCMP makes Customs aware of investigations it is undertaking. The results of all investigations are communicated to Customs.

7. Trends and Statistics

In 1983, the RCMP conducted an analysis of information contained in AICS relative to pornography.

For the five-year period 1978-82, a total of 7,770 importations of material deemed "indecent or immoral" were seized and/or detained by Canada Customs and the RCMP under the *Customs Tariff* and the *Customs Act*. Seizures by the RCMP constituted 9% of the total.

These figures *do not* include cases involving pornographic material which was seized under authority of the *Criminal Code* by the RCMP or other Canadian police agencies, or the majority of postal detentions by Canada Customs. However, these figures are considered by the RCMP to be representative of the illicit trade in pornography. The primary source countries were:

United States	83%
Sweden	6%
Denmark	6%
Other	5%

Within the United States the primary source states were:

California	36%
New York	25%
Connecticut	12%
North Carolina	2%
Florida	1%
Michigan	1%
Other	23%

Los Angeles, California, was the primary source city.

The primary destinations in Canada were:

Alberta	39%
Quebec	24%
Ontario	20%
British Columbia	4%
Other	13%

The above data has been updated for the six-year period from 1979 to 1984. The RCMP alone made 1,297 seizures of pornographic material during this period. The types of pornographic material seized across the country were as follows:

Books	16%
Catalogues	6%
Magazines	28%
Film	21%
Video Cassettes	6%
Assorted	24%

With the new computer systems in place, composite information about investigation enforcement procedures undertaken by the RCMP and Customs will be more comprehensive and complete.

Footnotes

[1] *Customs Act*, R.S.C. 1970, c.58.

[2] *Customs Tariff*, R.S.C. 1970, c.60

[3] *In re Hawkshaw and the Queen* (1982) 69 C.C.C. (2d) 503 (Ont. C.A.); *University of Manitoba* v. *Deputy Minister of Revenue Canada, Customs and Excise* (1983), 24 Man. R. (2d) 198 (Man.Co.Ct.)

[4] (1979) 234 C.R. (3d) 66 (Québec Superior Court)

[5] *Re Han and Deputy Minister of National Revenue for Customs and Excise* (1972) C.C.C. 399 (B.C.C.A.)

Regina v. *29455 Ontario Ltd. et al* (1978) 39 C.C.C. (2d) 352 (Ont. C.A.)

Regina v. *Prairie Schooner News et al* (1970) 1 C.C.C. (2d) 251, 75 W.W.R. 585 (Man. C.A.)

[6] *Supra*, footnote 3.

[7] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.

[8] Order in Council, April 16, 1932: P.C. 857.

Chapter 10

International Mail: Joint Jurisdiction of Canada Customs and Canada Post Corporation

Although Customs has the clear jurisdiction to examine all goods entering Canada by *mail*, Canada Post has a monopoly on the carriage of *letters*. The procedure Customs follows in dealing with mail and in dealing with letters is set out in section 40 of the *Canada Post Corporation Act*.[1] With emphasis added, it provides as follows:

> (1) All *mail* from a country other than Canada containing or suspected to contain anything subject to Customs or other import duties or tolls or anything the *importation of which is prohibited* shall be submitted to a Customs officer for examination.
>
> (2) A Customs officer may open any *mail, other than letters*, submitted to him under this section and may
>
> (a) cause *letters* to be opened in his presence by the addressee thereof or a person authorized by the addressee; or
>
> (b) at the option of the addressee, open letters himself with the written permission of the addressee thereof;
>
> and where the addressee of any *letter* cannot be found or where he refused to open the *letter*, the Customs officer shall return the letter to the Corporation and it shall be dealt with as undeliverable mail in accordance with the regulations.
>
> (3) A Customs officer shall deal with all *mail* submitted to him under this section in accordance with the laws relating to Customs and the importation of goods and, subject to such laws, shall deliver such mail to the addressee thereof, on payment of any postage due thereon, or shall return it to the Corporation.
>
> (4) Any non-mailable matter found by a Customs officer in any *mail* made available to him under this section shall be dealt with in accordance with the regulations.

The important distinction between "mail" and "letter" will be referred to later. But first, we will describe the administrative activities involved in Customs inspecting goods that have arrived in Canada by mail.

Canada Post initially receives all international mail at four centres: Montréal, Toronto, Winnipeg and Vancouver. The centres receive mail from specifically identified countries and forward it to Customs at one of twenty-two primary screening centres:

1. Toronto
2. Montréal
3. Vancouver
4. Winnipeg
5. Edmonton
6. Calgary
7. Ottawa
8. Halifax
9. Regina
10. London
11. Saskatoon
12. Victoria
13. Québec City
14. Hamilton
15. Kitchener
16. Moncton
17. Thunder Bay
18. Saint John, N.B.
19. Lethbridge
20. St. John's Nfld.
21. Sudbury
22. North Bay

Customs officers at these centres examine the mail and decide which items they will release and which are to be held for payment of duty or taxes or further investigation. Usually the initial decision of whether to retain the mail in Customs control is made quickly on the basis of an examination of the exterior of the item. Officers make their decision based on a number of factors, including size, sender, country of origin, etc.

Those items released are then processed as part of the regular mail delivery. ~~The~~ items not released and which are addressed to areas not immediately serviced by the 22 primary screening centres are then forwarded by Canada Post to the Customs office serving that area. It will then notify the addressee of the fact that the mail is in Customs control. Customs may, at this stage, open and inspect the mail, but typically it will ask the addressee to open it when it is claimed. The item is then inspected and either released or found to be prohibited. If it is found to be prohibited then the goods are ultimately dealt with in accordance with the laws relating to Customs.

As section 40 requires, a special procedure must be followed by Customs where a letter (as distinct from mail) is involved. Customs cannot open a letter without the written permission of the addressee. If an addressee or someone authorized by him refuses to open a letter, Customs must then return it to the Canada Post Corporation to be dealt with as undeliverable mail. The same result occurs if the addressee cannot be found to give consent to the opening of the letter. The postal Regulations with respect to undeliverable mail require, in most cases, the return of the letter to the country of origin.

For many years the term "letter" was not actually defined in the postal Regulations or legislation. Starting in 1970, Customs operated on the basis that officers were prevented from opening any first class mail regardless of type, size or probable contents until the addressee's permission was obtained.[2] This procedure became unmanageable and was changed in 1978. Instructions were given to Customs officers that "a letter is interpreted to mean any item which would reasonably be assumed to consist of correspondence as its principal content and which is in an envelope".[3]

In 1983, Canada Post Corporation passed a regulation known as the Letter Definition Regulations. Under regulation 2:

> Letter means one or more messages or information in any form, the total mass of which, if any, does not exceed 500g, whether or not enclosed in an envelope that is intended for collection or transmission or delivery to any addressee as one item, but does not include
>
> (a) an item carried incidentally and delivered to the addressee thereof by a sender who is a friend of the addressee; ...
>
> (g) a newspaper, magazine, book, catalogue, ... manuscript ...

As a result of the new Regulation, Canada Customs published a memorandum setting forth new Customs procedures for the examination of goods arriving by mail.[4] The memorandum advised Customs officers in part:

> 6. In accordance with the [Regulation] Customs Inspectors are not to open any mail item except those that are excluded by the definition (e.g. ... a newspaper, magazine, book, catalogue, ... manuscript ...) weighing 500 grams or less without the written permission of the addressee, even though goods or prohibited items are suspected to be contained in the mail item.
>
> 7. In instances where it is determined that the mail item weighs 500 grams or less and it is felt that examination is warranted because the country of origin is prominent in the drug trade, or the addressee is a known smuggler or the subject of an intelligence alert, the mail item is still not be opened except by the addressee, or the addressee's authorized agent, or with the addressee's written permission.
>
> 8. Customs Inspectors may, for purposes of examination, open without the addressee's written permission any mail item weighing in excess of 500 grams.
>
> 9. Customs is committed to maintaining the privacy of personal correspondence and will not tolerate the reading by Customs personnel of any such correspondence found in letter or parcel mail. The term "correspondence" does not include invoices, packing slips, order forms or other business documentation which may be required for Customs purposes.

The memorandum also indicated that the new procedures were "interim" pending expected revisions to the *Customs Act*. In fact, the revisions had been under consideration for several years. The last attempt at new legislation occurred when Bill C-6, the *Customs Act*,[5] was introduced and given first reading in the House of Commons on January 16, 1984.

The portion of the Bill dealing with the issue of the jurisdiction of Customs to inspect goods arriving Canada by mail provided as follows: (emphasis added)

> 92.(1) An officer may...
>
> (b) at any time up to the time of release, examine any *mail* that has been imported and, subject to this section, open or cause to be opened any such *mail* that he suspects on reasonable grounds contains any goods referred to in the *Customs Tariff*, or any goods the importation of which is prohibited, controlled or regulated under any other Act of Parliament, and take samples of anything contained in such mail in reasonable amounts;

The term "mail" is given the meaning contained in section 2 of the *Canada Post Corporation Act*, namely, "mailable matter from the time it is posted to the time it is delivered to the addressee thereof". The term "mailable matter" in the same *Act* is said to mean, "any message, information, funds or goods that may be transmitted by post". (The term "letter" does not appear in the *Act*.)

The power to open mail given by Section 92(1)(b) is limited by sections 92(2) and 92(3), which provide as follows:

> (2) An officer may not open or cause to be opened any *imported mail* that weighs *thirty grams* or less unless the person who sent it has completed and attached to the mail a label in accordance with article 116 of the Universal Postal Convention.
>
> (3) An officer may cause *imported mail* that weighs *thirty grams* or less to be opened in his presence by the person to whom it is addressed or a person authorized by that person.

The label referred to in subsection (2) is affixed by the sender.

The necessary changes to section 40(1) and (2) of the *Canada Post Corporation Act* to accommodate the proposed *Customs Act* would result in the section reading: (the italicized portions are added to the existing section)

> 40.(1) All mail *arriving in Canada* from a *place outside* Canada *that contains* or *is* suspected to contain anything the importation of which is prohibited, controlled or regulated under the *Customs Act* or any other *Act of Parliament* shall be submitted to a Customs officer.
>
> (2) All mail that is submitted to a Customs officer under this section remains, for the purposes of this Act, in the course of post unless it is seized under the *Customs Act*.

The effect of all these changes would be to allow Customs to open all international mail weighing more than 30 grams (1.05 ounces) rather than the weight ceiling of 500 grams (17.5 ounces) that presently exists. Moreover, Customs would be able to open a letter weighing less than 30 grams if it had affixed to it the label referred to in section 92(2).

It is estimated that 85% of all international mail arriving in Canada weighs less than the proposed weight ceiling of the 30 grams. The mail which Customs cannot open in the proposed *Act* would consist of what most people would understand to be a "letter". The mail which Customs can open consists of what most people understand to be packages, parcels and envelopes containing goods.

Bill C-6 died on the Order Paper at the end of June, 1984. It is expected that the Bill will be re-introduced in this session of Parliament. In the meantime, the existing Postal Regulation remains in effect restricting the inspection of international mail by Customs to material weighing more than 500 grams. It should be noted however, that excepted from this restriction are newspapers, magazines, books and catalogues.

Footnotes

[1] S.C. 1980-81-82-83, c.54.

[2] Instructions to Port Officers, April 24, 1970, D4469, Files 8340-3; 8455-4 (Canada Customs).

[3] Instructions to Port Officers, November 8, 1979, revision of D4469.

[4] Memorandum R5-1-2, December 7, 1983.

[5] Bill C-6, An Act respecting Customs (2nd Session, 32nd Parliament, 32 Elizabeth II, 1983-84).

Chapter 11

Canada Post

The *Canada Post Corporation Act*[1] does not prohibit the use of the mails to distribute pornographic material. Such prohibition is found in section 164 of the *Criminal Code* passed as part of the 1953-54 Code Amendments. The material part of this section is:

> "Everyone commits an offence who makes use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, ..."

What is deemed to be "obscene" is described in section 159(8) of the *Criminal Code*. The words "indecent, immoral or scurrilous" are nowhere defined in the *Criminal Code*. These words have, however, been given legally enforceable meaning by the Courts and have, in fact, been treated in precisely the same way as the word "obscene". In the leading case of *R.* v. *Popert*[2] the Ontario Court of Appeal, in reversing the trial judge, said:

> "I concede that the term 'immoral' is a word of imprecise meaning and that it may be difficult to apply. However, the problem is not unique. Often the law, whether a product of case law or statute, expresses itself in imprecise terms such as 'reasonable', 'undue', and 'dangerous'. It is through such words that the values of the community find expression in the court-room. It is the function of the courts to work as best they can with the tools in hand. In my view, the learned trial judge was wrong in simply finding no meaning in this word."[3]

The Court also decided that the appropriate test to be applied in interpreting the section was "the community standard of tolerance" and that this test, propounded in cases dealing with obscenity[4], "should (also) be applied in determining whether material is immoral or indecent"[5] and that, "the reference to a community standard imports an objective test into the ascertainment of indecency and immorality ...".[6]

While the *Canada Post Corporation Act* does not prohibit the use of the mails to distribute pornographic material, it does contain sections that provide for a degree of regulation. Section 41(1) of the *Act* provides a comprehensive procedure empowering the Minister responsible for the *Act* to make an order "prohibiting the delivery, without the consent of the Minister, of mail addressed to or posted by" any person that

> the Minister believes on reasonable grounds ... is, by means of mail, committing or attempting to commit an offence, or aiding, abetting, counselling or procuring any other person to commit an offence ... or ... by a means other than mail, aiding, abetting, counselling or procuring any other person to commit an offence by means of mail.

The section contemplates an initial "interim prohibitory order", with the "person affected" entitled to receive a copy of the order and the reasons for it. An appeal can be taken to a board of review. The board is obliged to hold a hearing and to make recommendations to the Minister.

The Minister apparently retains the discretion (regardless of the recommendations of the Board of Review) to either revoke the interim order or declare it to be a final prohibitory order. A final prohibitory order remains in effect until revoked by the Minister if "satisfied that a person affected will not use mail for any of the purposes described in subsection (1)."

The volume of mail is such that detection is clearly an enormous problem. Postal authorities are not entitled to open deliverable letters simply on suspicion. The practice the Post Office has chosen to adopt in administering the provisions of its *Act* is simply to react to complaints. No pro-active procedures are apparently in effect.

Once a complaint has been received, an affidavit is apparently obtained from the complainant verifying that the material has indeed been received through the mail. It seems that most of the current offensive material appears to have originated in the United States, although authorities have begun to notice that some of the material seems to have been produced in Canada.

Legal advice is taken on the complaint and an interim prohibitory order may be issued by the Minister on the recommendation of the chairman of the board of Canada Post Corporation.

We are not aware of how many such interim prohibitory orders have been made.

We were told that very few appeals are taken from interim prohibitory orders. We were also told that, since 1975, only 34 *final* prohibitory orders have been made against persons or corporations sending mail.

The following is a breakdown according to country of origin of the persons or corporations named in these orders:

United States	16
Denmark	6
Sweden	5
Holland	1
Canada	6

Thirty-one of the final prohibitory orders remain in effect. The three orders that have been revoked all apply to Canadians.

As a result of our discussions with Post Office officials we conclude:

1. That the interception of pornographic material in the domestic mail has been given no administrative priority;
2. That the Post Office recognizes no particular need to either assume an investigatory role or to initiate any action to attempt to better control distribution of pornographic material through the domestic mail. It appears that the present policy of acting only on complaints will be continued;
3. That there is no effective co-ordination involving the Post Office and law enforcement officials to better control the distribution of pornographic material through the domestic mail.

Footnotes

[1] *Canada Post Corporation Act*, S.C. 1980-81-82-83, c.54.

[2] (1981), 58 C.C.C. (2d) 505 (Ont. C.A.).

[3] *Ibid.*, at 508-509 per Zuber J.A.

[4] *R.* v. *Penthouse International Ltd. et al* (1979), 96 D.L.R. (3d) 735 (Ont. C.A.). *R.* v. *Prairie Schooner News Ltd. and Powers* (1970), 75 W.W.R. 585 (Man. C.A.).

[5] *Ibid.*, at 510.

[6] *Ibid.*, at 508.

Chapter 12

Broadcasting and Communications

1. The Broadcasting Act

The Act defines broadcasting as, "any radiocommunication in which the transmissions are intended for direct reception by the general public."[1]

The *Act* then provides a broadcasting policy for Canada and the mechanisms to implement that policy. It also establishes the legal framework within which radio and television undertakings are operated throughout Canada.

The Act is in three parts. The first part declares a specific broadcast policy. The second part relates to the Canadian Radio-Television and Telecommunications Commission (CRTC). The third part concerns the Canadian Broadcasting Corporation (CBC).

For our purposes, the relevant portions of part I of the broadcasting policy are:

> *Section 3*: It is hereby declared that...
>
> (b) the Canadian broadcasting system should be effectively owned and controlled by Canadians to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada;
>
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast, but the right of freedom of expression and the right of persons to receive programs, subject only to generally applicable statutes and regulations, is unquestioned;
>
> (d) the programming provided by the Canadian broadcasting system should be varied and comprehensive and should provide reasonable, balanced opportunity for the expression of differing views on matters of public concern, and the programming provided by such broadcaster should be of high standard, using predominantly Canadian creative and other resources.

The *Act* defines "broadcasting undertaking" as including, "a broadcasting transmitting undertaking, a broadcasting receiving undertaking and a network operation, located in whole or in part within Canada or on a ship or aircraft registered in Canada".[2]

The *Act* makes a distinction between "the Canadian broadcasting *system*" in section 3(b) and (c) and "a national broadcasting *service*". The system comprises both "public and private elements". The service is declared to be "a corporation established by Parliament for the purpose" and is to be "predominantly Canadian in content and character".[3] The national broadcasting service is, of course, the CBC. The *Act* declares that the CBC should:

> (i) be a balanced service of information, enlightenment and entertainment for people of different ages, interest and tastes covering the whole range of programming in fair proportion,
>
> (ii) be extended to all parts of Canada, as public funds become available,
>
> (iii) be in English and French, serving the special needs of geographic regions, and actively contributing to the flow and exchange of cultural and regional information and entertainment, and
>
> (iv) contribute to the development of national unity and provide for a continuing expression of Canadian identity;[4]

In 1975, separate legislation was passed concerning the Canadian Radio-Television and Telecommunications Commission.[5] The provisions of this *Act* are largely procedural. The substantive objects and the powers of the Commission are still to be found in Section 15 of the *Broadcasting Act* and are as follows:

> Subject to ... directions to the Commission from time to time by the Governor in Council under the authority of this *Act*, the Commission shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of this *Act*.

The powers of the Commission include prescribing classes of broadcasting licence, making regulations applicable to all licensees on such matters as standards of programs, conditions for the broadcasting of network programs and the operation of stations as part of a network.[6]

The Commission has nine full-time members and ten part-time members appointed by the Governor in Council.[7] From the ranks of the full-time members, the Governor in Council designates a chairman and two vice-chairmen of the Commission.[8] The nine full-time members constitute an Executive Committee,[9] whose powers include issuing and renewing broadcasting licences and imposing or amending such conditions of licence as are deemed appropriate.[10] While the Executive Committee can issue or renew a licence, only the full Commission can revoke a licence.[11]

The Commission is obliged to hold a public hearing in connection with either the issuing of a broadcasting licence or its revocation or suspension.[12] The Executive Committee, if it is satisfied that it is in the "public interest" to do so, may decide to hold a public hearing in connection with the amending of a broadcasting licence or "a complaint by a person with respect to any matter within the powers of the Commission".[13] The Commission has the powers, rights and privileges of a superior court of record in respect of public hearings and can, for example, require the attendance of witnesses, the production and inspection of documents and property and the enforcement of its orders.[14]

The Commission can make its own rules, "respecting the procedure for making applications, representations and complaints and the conduct of its hearings and business".[15]

The *Act* provides for appeals from the actions taken by the Commission. Any decision or order that relates to the issue, amendment, renewal, revocation or suspension of a broadcasting licence can be appealed to the Federal Court of Appeal. The appeal is, however, limited to questions of law or jurisdiction.[16]

There is also an appeal to the Governor in Council. But the appeal is limited to the issue, amendment or renewal of a broadcasting licence. The Cabinet has 60 days from the date of such issue, amendment or renewal to decide whether to refer the matter back to the Commission for recommendation and hearing.[17]

The Commission must then hold a hearing and reconsider the matter, and may either rescind its earlier decision, issue a licence on the same or different conditions to any other person, or confirm its earlier decision with or without alterations.[18] If the earlier decision is confirmed, then the Cabinet still retains the power to set aside the confirmation order.[19] If the Commission issues a licence on different conditions or to someone else, then this action would appear to be subject to a further appeal to the Cabinet.

In summary, the Cabinet has the ultimate power to overturn a decision made by the Commission concerning the issue, amendment or renewal of a broadcasting licence. At the moment, the Cabinet has apparently no power to ultimately decide on matters of licence suspension or revocation. The Commission's exclusive jurisdiction in this area is subject only to an appeal to the Federal Court of Appeal based on questions of law or jurisdiction.

The Commission is obliged to hold a hearing and satisfy itself that the licensee has violated or failed to comply with any conditions of the licence before that licence can be revoked or suspended. Where the Commission finds that there has been such a failure or violation it must report its findings and recommendations to the Minister of Communications who must, in turn, lay the report before Parliament.[20] The report to the Minister and ultimately to Parliament, appears to be for information only.

The Commission has the general requirement to report annually to the Minister and to Parliament on its activities.[21]

On December 20, 1984, Bill C-20, ***An Act to amend the Canadian Radio-Television and Telecommunications Commission Act, the Broadcasting Act and the Radio Act***, was given first reading in the House of Commons. Second reading took place on February 14, 1985. The *Act* contains significant amendments that will be referred to in the course of the discussion leading to our recommendations.

2. The Canadian Radio-Television and Telecommunications Commission

During our public hearings we received many comments about the CRTC. Details of the comments appear in Section I, Chapter 5. The concern most frequently expressed was the alleged failure of the Commission to supervise program content generally and particularly with respect to pay television. We were also told that the Commission should control programming available by means of satellite antenna. Some complained that the Commission did not have an adequate appreciation of the concerns parents have about the content of programs that could be seen by their children. There was also an allegation that the Commission was not prepared to take any or any effective action to prevent offensive program content.

Our Committee met with the Chairman and some of the members of the Commission as well as with the Commission's staff. We discussed relevant aspects of the Commission's work and there have been a variety of subsequent consultations. In view of some of the comments made at our public hearings, we think it is important to record that the Commission has been completely co-operative and forthcoming in the course of our contact with it. We are satisfied that the Commission has no desire for isolation or aloofness on the subject of program content and regulation; indeed, quite the contrary. The Commission follows a practice of publicizing its proposed policy and operational changes and of inviting public response. Its record of organizing and achieving public involvement, both at the level of written response and public hearings is, in our view, impressive.

There are now more than 3,000 licensees in Canada holding licences for AM and FM radio broadcasting, as well as television stations, cable systems and pay television. The Commission currently employs a total of 432 employees. The Commission takes about 3,000 decisions every year and while some of the decisions are routine, others require lengthy and careful examination. The important public hearing and accountability requirements contained in its legislative mandate require the Commission to move with deliberate speed. We think the Commission's present resources are being fully utilized.

As will be apparent in the course of the discussion that follows, the Commission has taken several important initiatives with respect to program content and the administration of its mandate.

It must be understood at the outset that the Commission does not and cannot perform the role of a censor. The scheme of the existing legislation does not provide for any pre-clearance of material. The role of the Commission is to review programming after the fact. The policy of the *Broadcasting Act* states clearly in section 3 that responsibility for program content rests with the licensee. The Commission's potential power in the area of program content is limited to passing appropriate Regulations, attaching conditions of licence in the first instance, revising conditions of licence and reviewing actual performance during the term of the licence, if necessary, and always on an application for renewal.

The view that the Commission has no jurisdiction to act as a censor was expressed by the Federal Court in *National Indian Brotherhood* v. *Juneau*.[22] The Court said:

> Reading the Act as a whole..., I find it difficult to conclude that Parliament intended to or did give the Commission the authority to act as a censor of programs to be broadcast or televised. If this had been intended, surely provision would have been made somewhere in the Act giving the Commission authority to order an individual station or a network, as the case may be, to make changes in a program deemed by the Commission, after an inquiry, to be offensive or to refrain from broadcasting same. Instead of that, it appears that its only control over the nature of programs is by use of its power to revoke, suspend or fail to renew the licence of the offending station.

We are quite definitely of the view that the legislative mandate of the Commission should not be essentially changed in order to turn it into a censor board. Even if we were philosophically convinced that the Commission should act as a censor, we have difficulty imagining how it could then possibly expect to review all of the programming currently being broadcast in Canada. The administrative costs and complications would be enormous. Just as important, in our view, the results would stultify rather than encourage appropriate creative broadcasting expression.

We are satisfied that there are many more effective ways for the Commission to deal with program content.

The CRTC's legislative scheme provides the Commission with at least four possible ways to deal with programs that are either contrary to law or sexually abusive:

(a) by attaching program standards and conditions to a broadcast licence

(b) by Regulation

(c) by requiring broadcasters to self-regulate

(d) by criminal sanctions under the *Criminal Code* or the *Broadcasting Act*.

2.1 Conditions of Licence

It was urged upon us at the public hearings that the CRTC should impose on a broadcasting licence, conditions concerning program content both with respect to pornography and sex-role stereotyping. As we have already mentioned, the Commission has the ability under section 17 (1)(a) and (b) of the *Broadcasting Act* to issue, amend or renew licences subject to conditions that it "deems appropriate for the implementation of the broadcasting policy enunciated in Section 3" of the *Act*. The current relevant portions of Section 3 are set out above.

It is important to note that the conditions that are attached must be "related to the circumstances of the licensee". The material parts of Section 17 read as follows (emphasis added)

> Section 17 (1) In furtherance of the objects of the Commission, the...Commission, may
>
> (a) issue broadcasting licences for such terms ... and subject to *such conditions related to the circumstances of the licensee*
>
> (i) as the Executive Committee deems appropriate *for the implementation of the broadcasting policy enunciated in Section 3,...*
>
> (b) *upon application by a licensee*, amend any conditions of a broadcasting licence issued to him;
>
> (c) issue renewals of broadcasting licences ... as the Executive Committee considers reasonable and subject to the conditions to which the renewed licences were previously subject or *to such other conditions as comply with paragraph (a)*.

The emphasized portions serve to illustrate two important aspects of the section: firstly, an amendment to licence conditions can arise only on an application by the licensee and not at the initiative of the Commission; and secondly, that the conditions of licence must be related to the particular circumstances of the licensee.

Where the Commission has decided to impose conditions of licence, its practice has been to carefully cater to the licensee's particular environment and to make the conditions very specific, so that compliance can be easily and clearly measured.

The question has been asked, "Why can't compliance with the terms of the *Act* and Regulations be made a condition of licences?" The answer appears to be that to do so would be to place licensees in a position of double jeopardy where breach of the *Act* or Regulations could be not only an offence under the *Act*, but also result in loss or suspension of licence, without the appropriateness of the separate consequences being examined separately.

The question has also been asked, "Why can't program standards be made conditions of licence?" The answer is that conditions of licence have to be "related to the circumstances of the licensee" as well as "appropriate for the implementation of the broadcast policy in Section 3". The present policy provisions for Section 3 do not contain any declarations about program content or standards beyond what is contained in sub-section (d). Therefore, it is uncertain whether the Commission can now impose actual program standards as conditions of licence.

However, Bill C-20, referred to earlier, would amend Section 3 by adding the following to the broadcasting policy contained in the *Act*:

> (C.1) the programming provided by the Canadian broadcasting system should respect and promote the equality and dignity of all individuals, groups or classes of individuals, regardless of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In proposing this amendment, the government has accepted the June, 1984 recommmendation of the Parliamentary Subcommittee on Sexually Abusive Broadcasting.

Speaking to the Bill in the House of Commons, the Minister of Communications said:

> Part II of the Bill provides for a new policy objective that will become part of Section 3 of the Broadcasting Act. This objective concerns programming of an abusive nature, and its purpose is to define the CRTC's responsibility in this respect. It will be an incentive for broadcasters to be increasingly aware of the problem.[23]

Should the above amendment become law, it would appear that the Commission will then be able to impose conditions of licence relating to the standard of programming described in the proposed (C.1).

However, the imposition of such conditions could only arise "subject to such conditions related to the circumstances of the licensee".[24] It is difficult to know how the Commission could impose such a general programming condition of licence in the absence of any specific reasons relating to a particular licensee. As the Chairman of the CRTC said in an appearance before the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

> In the ... areas of ... conditions of licence ... the CRTC could further address the problem of sexually abusive programming. The CRTC could, if it considered such a measure necessary in a particular case, indicate for example to that licensee that as a condition of its licence it must observe some guidelines concerning sexually abusive programming. It must be remembered, however, that a new condition of licence cannot be imposed on an existing licensee, except at the time of licence renewal.[25]

In the result, the proposed amendment adds a new and salutory policy objective to the *Broadcasting Act* which, in appropriate particular cases, could be made a condition of licence.

2.2 Regulations

As we have mentioned, under Section 16 of the *Broadcasting Act* the CRTC may make Regulations "in furtherance of its objects". Under the existing legislation the Commission may make Regulations applicable to *all* licensees and relating to a variety of matters, including "standards of program" and "such other matters as it deems necessary for the furtherance of its objects".[26]

Some years ago, the Commission made Regulations in this area applying to all public broadcast licensees. The Regulations for AM and FM radio licensees provided the following as part of regulations 5 and 6 respectively:

> (1) No station or network operator shall broadcast
>
> (a) anything contrary to law;
>
> (b) any abusive comment on any race or religion;
>
> (c) any obscene, indecent or profane language.[27]

The Regulations for television licensees provided in part:

> 6 (1) No station or network operator shall broadcast
>
> (a) anything contrary to law;
>
> (b) any abusive comment or abusive pictorial representation on any race, religion or creed;
>
> (c) any obscene, indecent or profane language or pictorial representation.[28]

The ability of the Commission to pass such Regulations has been challenged in prosecutions for their alleged breach. In 1977, the Saskatchewan Magistrate's Court found that a radio broadcast containing a poem and comments on the poem about the Pakistani race were abusive, but concluded that the Regulation did not reasonably fall under Sections 3 and 16 of the *Act* and was, therefore, beyond the power of the Commission to enact.[29]

This decision was reversed in the Saskatchewan Court of Appeal. The Court held that the Magistrate erred in holding that Regulation 5(1)(b) of the Radio A.M. Broadcasting Regulations was beyond the authority of Section 3 and 16 of the *Broadcasting Act*. The Court, however, gave no reasons for its decision.

The question was considered and apparently resolved in favour of the Commission's power by the Supreme Court of Canada in 1978.[30] A case arose when a radio station broadcast a telephone interview without the consent of the person interviewed. The station was charged with a breach of Regulation 5(1)(k) which provides:

> 5 (1) No station or network operator shall broadcast...
>
> (k) Any telephone interview or conversation, or part thereof, with any person unless
> (i) the person's oral or written consent to the interview or conversation being broadcast was obtained prior to such broadcast, or
> (ii) the person telephoned the station for the purpose of participating in a broadcast.

The lower courts were divided on the questions of firstly, whether the Regulation was beyond the power of the Commission to enact and secondly, the nature of the Commission's power to regulate programming.

In deciding that the Commission had the power to enact the Regulation, the majority of the judges in the Supreme Court of Canada found that:

> ...the validity of any Regulation enacted in reliance upon Section 16 must be tested by determining whether the Regulation deals with a class of subject referred to in Section 3 of the statute and that in doing so the Court looks at the Regulation objectively.[31]

The Court agreed with the following comment made by one of the judges who had heard the case in the Ontario Court of Appeal:

> It is obvious from the broad language of the Act that Parliament intended to give to the Commission the wide latitude with respect to the making of Regulations to implement the policy and objects for which the Commission was created.[32]

The Supreme Court concluded that:

> ... whether we consider that the impugned Regulation will implement a policy or not is irrelevant so long as we determine objectively that it is upon a class of subject referred to in Section 3.[33]

The Court decided that the Regulation fell within the class of subjects mentioned in Section 3(b) (the broadcasting system should "strengthen the cultural, political, social and economic fabric of Canada"), and Section 3(d) (programming should "provide reasonably balanced opportunity for the expression of the differing views on matters of public concern" and "should be of high standard"), and held that:

> ... the Commission might well have concluded that the broadcasting station could not provide "reasonably balanced opportunity for the expression of differing views" unless it granted confidentiality to the person interviewed.[34]

On the further question of the Commission's power to regulate programming, the Court disagreed with the view expressed by one of the judges in the Ontario Court of Appeal that, in effect, the broadcast policy in Section 3 of the *Act* that programming be of high standard should be confined to the actual words that go out over the air in a specific program. The Court adopted instead the view of Mr. Justice Brooke in the Ontario Court of Appeal:

> In my view the purpose of the impugned Regulation is to prohibit an undesirable broadcasting technique, one which does not reflect the high standard of programming which the Commission must, by Regulation of licensees, endeavour to maintain.[35]

The Court went on to say:

> That 'an undesirable broadcasting technique' may well affect the high standard of programming is, I think, self-evident. ... the word 'programming' extends to more than the mere words that go out over the air but the total process of gathering, assembling and putting out the programs generally which is covered by the requirement of the high standard of programming. The Commission might well have concluded that the enactment of Section 5(k) was necessary to prevent development of programming which was the opposite of "high standard".[36]

The Court held that the Regulation could also be passed under the general power given to the Commission under Section 16(l)(b)(ix) as being "necessary for the furtherance of its objects".

This rather painstaking review of the decision of the Supreme Court of Canada has been necessary in order to appreciate the length and breadth of the Commission's power to make Regulations and in order to understand how enforceable may be new Regulations recently passed by the Commission.

On October 2, 1984, after two years of publishing and amending its proposals and obtaining public comment, the Commission enacted its first complete pay television Regulations and the following Regulations concerning abusive radio and television programming, in substitution for the Regulations previously in effect:

> Regulation 5(1)(b) (A.M. Broadcasting)[37] and Regulation 6(1)(b) (F.M. Broadcasting):[38]
>
> Any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> The equivalent in the new Regulation for Television Broadcasting is:[39]
>
> 6(1)(b): Any abusive comment or abusive pictorial representation which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The new Regulations for Pay Television Broadcasting[40] are as follows:

> 6. A licensee shall not distribute in its programming any abusive comment or abusive pictorial representation that, when taken in context, tends or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 7. Where a program to be distributed by a licensee is not suitable for an audience other than an adult audience by reason of its subject matter or treatment thereof, or any characteristic thereof, including its depiction of violence, nudity or explicit sexual conduct, or by reason of coarse language or other content likely to be offensive to some viewers, the licensee shall so advise by providing an appropriate indication thereof at the beginning, and in all promotion of the programming.

We note that when the Commission first published its proposals for pay television Regulations in November, 1982, the proposals did not contain the Regulations that are set out above. These Regulations were first proposed in July, 1984, because of, as the chairman has put it:

> ...the concerns [that were] raised by many groups, individuals, and organizations with regard to the need to include in [the] Regulations a prohibition against abusive programming on the basis of gender.

While the Regulations against abusive comment or representation are the same for pay television as they are for radio and television broadcasting, there is otherwise a qualitative difference between them. The latter Regulations still prohibit the broadcast of "anything contrary to law" (5(1)(a) and 6(i)(a)) and "any obscene, indecent or profane language pictorial representation" (5(1)(c) and 6(i)(c)). The pay television Regulations contain no such provisions.

The pay television Regulation 7 set forth above is unique to pay television and is not found in the Regulations for other television or radio broadcasting. The policy of Regulation 7 is to allow material for an adult audience to be shown providing a warning is given, rather than to prohibit the kind of representations that would be proscribed in the public media.

In terms of the enforceability of the new Regulations, it is important to remember that Bill C-20 will amend the class of subjects referred to in section 3 by adding paragraph c.1 (*supra*). Should the amendment be enacted, there would seem to be little doubt about the validity and enforceability of the new Regulations.

As the chairman of the CRTC said in a statement to the Sub-Committee of the Standing Committee on Communications and Culture on May 9, 1984:

> With regard to amendments to the *Broadcasting Act*, we are aware that the [then] Minister of Communications may take to Cabinet a proposal to amend section 3 to include gender as a group protected from abusive programming. Should the new proposal become law, it would have the effect of giving the Commission a more precise jurisdictional basis, first, to make or amend Regulations prohibiting abusive programming, and second, to press broadcasters with respect to their responsibilities in this area at licence renewal time.[41]

A very significant aspect of the amendment is the requirement that the programming provided by the Canadian broadcast system should not only respect but *promote* equality and dignity. It remains to be seen how the Commission will ensure the promotion of equality and dignity in the system.

2.3 Self-Regulation

The Commission has been active in its examination of sex-role stereotyping in broadcasting. The task force established by the CRTC published its report, *Images of Women*, in the fall of 1982. The Task Force was composed of members of the public, the advertising and the broadcasting industries and representatives of the CBC and the CRTC. The recommendations of the Task Force were that the methods of dealing with sex-role stereotyping should be self-regulation with public accountability. The two-year period of self-regulation ended in the Fall of 1984. During this period the Commission did the following:

(i) the report, *Images of Women*, was widely circulated;

(ii) the self-regulatory committees of the industry and the CBC were required to submit three reports to outline measures taken to deal with sexual stereotyping. The reports described what steps had been taken for processing complaints, for self-education on the problem and actions to comply with guidelines;

(iii) every broadcaster in Canada was required in the Fall of 1984 to submit an individual report on what action had been taken to deal with the problem at their station;

(iv) communications from the public on sexual stereotyping and pornography were tabulated and analyzed by the Commission. Over 15,000 such letters had been received by the Commission;

(v) a research company, Erin Research Inc. has been asked by the Commission to analyze program content and to measure compliance to industry guidelines concerning sexual stereotyping. The Company's work will also include monitoring pay television for sex-role stereotyping in commissioned programming and violence in acquired programming.

It is expected that the report of Erin Research Inc. will be received by the Commission in the Spring of 1985. The Commission has indicated that it will then publish a paper containing the results and will sponsor public discussions on the issues.

On January 17, 1985 the Commission announced that it had accepted the final version of Programming Standards and Practices prepared by the pay television licensees. The final version of the Standards and Practices emerged after public comment on the original version published in February, 1984 and after a meeting between the Commission and the licensees. The pay television licensees have established an industry committee to implement the guidelines and to deal with complaints. The Commission will receive periodic reports on complaints and will review the Standards and Practices in early 1986.

It seems clear that the Commission has decided that self-regulation by the industry will be the best method of ensuring compliance with Pay Television Regulation 7.

The Standards and Practices acknowledge that the pay television licensees "have a responsibility to ensure that the programming they provide is of high quality and meets general community standards within the context of a discretionary service". All programs are to be rated, no x-rated films will be shown and all material will be fully screened prior to airing. The following additional aspects of the Standards and Practices are worth noting:

> 4. *Basis of Discretion*
>
> The discretion of programming personnel will be exercised responsibly and in good taste. In particular, no material will be selected that is
>
> (a) contrary to law, including the *Broadcasting Act* and CRTC Regulations; or
>
> (b) offensive to general community standards.
>
> "Community standards" will necessarily change over time and therefore will be subject to continuing review and evaluation. Pay television licensees will not select programming that would go beyond an "R-rating" or its equivalent.

Under the section referred to as "Classification and Cautionary Warnings", the Standards and Practices provide for the publication and distribution of a program guide to advise of the classifications of programming. There is also provision for a cautionary warning on-the-air at the beginning of programs. The following classifications will be used:

First Choice and Superchannel:

G: Suitable for viewing by a general audience of all ages;

PG: Parental Guidance suggested. Some material may not be suitable for children;

A: Parents are strongly cautioned that some material may be unsuitable for children and young teenagers. Discretion is advised;

R: Contains material that is recommended for adult viewing only.

Super Ecran: Tous-for all
14 and over
18 and over.

There are provisions requiring licensees to "exercise particular care" with respect to programming during family viewing periods and requiring licensees to schedule sexually explicit and/or violent material in the late evening or early morning hours only. These guidelines are to be reviewed by the Commission after one year for "adequacy".

2.4 Criminal Sanctions

The sanctions contained in the *Criminal Code* and the *Broadcasting Act* are available to the Commission and law enforcement authorities as a further method of dealing with program content.

Although Section 159(1) and 159(2)(a) of the *Criminal Code* contain provisions that could result in a prosecution being brought against a radio or television broadcaster for publishing, distributing, circulating or exposing to public view any obscene picture or phonograph record, it is much more likely that criminal proceedings would be taken under the *Broadcasting Act*.

It contains significant criminal sanctions. Licensees who violate the provisions of any Regulation applicable to their licence commit an offence under the *Act*, punishable on summary conviction by a fine not exceeding $25,000 for a first offence and $50,000 for each subsequent offence.[42] Anyone who operates a broadcasting undertaking as part of a network and breaches conditions of licence, or who carries on a broadcasting undertaking without a valid or subsisting licence, is guilty of an offence and is liable on summary conviction to a fine not exceeding $1,000 for each day that the offence continues.[43]

Where there has been an alleged breach of Regulation, the Commission's practise has been to proceed according to the seriousness of the allegation. If the matter is very serious, the Commission will start its own proceedings to put the broadcasting licence at risk.

If the matter is less serious, the Commission will have the licensee prosecuted for an offence under the *Act*.

It should be noted that the charge that could result from a breach of a condition of licence is only available in the case of a licensee operating as part of a network.

2.5 Complaints Procedure

Because the Commission has neither the resources nor the legislative mandate to closely and consistently monitor on-air programming, it depends on members of the public to bring to its attention incidents which may offend the *Broadcasting Act* or Regulations.

Typically, the Commission receives complaints from individuals, groups, competitors of a licensee and sometimes from governments. The Commission's policy upon receipt of a complaint is to immediately advise the licensee of its contents. The licensee is invited to respond to the substance of the complaint. About 80% of the complaints are resolved by the licensee agreeing with the substance of the complaint and making the necessary adjustment in its operations.

In the remainder of the cases, the Commission will advise the complainant of the licensee's response and do what it appropriately can to resolve the matter based on an understanding of the respective positions. Licensees are obliged to keep a recording of all broadcasts for at least 30 days. If a complaint concerns program content, either generally or specifically, the Commission can ask a licensee to provide the appropriate tape.

The Commission adopts a range of actions to handle complaints: it may require the licensee to attend a special meeting to discuss the complaint, or, if the issue does not appear to be urgent, it may decide that the substance of the complaint should be discussed on the next planned and regular occasion when the Commission meets with the licensee.

The Commission may, if the Executive Committee is convinced that it is in the public interest to do so, hold a public hearing in connection with a complaint.[44]

The Commission can also simply proceed to have the licensee charged with an offence under the *Broadcasting Act* for either a breach of the Regulations or the conditions of licence.

The Commission has, in fact, held infrequent public hearings as a result of complaints about its licensees. The public does, however, have a variety of opportunities to advise the Commission about its reaction to the conduct of licensees.

The CRTC has been active in holding hearings in various parts of Canada. These hearings obviously have predetermined agendas, but the Commission has been prepared to hear as additions to its agenda, special representations from members of the public concerning the performance of licensees in the area. The

Commission has also said it is eager to receive any written comments from members of the public on any issue involving the broadcasting system generally or any issue involving specific licensees.

At the time a licence is renewed, the public can intervene to oppose the renewal or to seek to impose conditions of licence or requirements on the licensee. At the present time, the Commission cannot issue licences for more than five years.[45] Under the proposals contained in Bill C-20 the maximum licence period will increase to seven years.[46] So, it must be said that the opportunity for the public to comment about a licensee's performance at licence renewal hearings will lessen if the amendment passes and the Commission acts on the amendment.

The Commission must hold a public hearing if it has in mind the revocation or suspension of licence.

The Commission has never actually ordered the suspension of a licence. It has, however, ordered the revocation of licences for breach of conditions of licence. The Commission has yet to revoke a licence on the basis of program content, but it has issued a variety of "public notices" spelling out its views on a host of matters, such as fairness in news reporting, the "right to respond" and the need to be free of "demeaning comments [and] incitement to violence toward any identifiable group".

It must be remembered by those who think the Commission has not acted harshly enough in imposing sanctions on licensees, that to suspend or cancel a broadcast licence has the result of withdrawing service to an innocent audience. It is, therefore, understandable that the Commission has decided to regulate in an atmosphere designed to process complaints quickly and to carefully monitor a licensee's responses to complaints before the situation becomes acute. There is nothing to suggest, however, that the Commission will not impose ultimate sanctions if faced with continuing breaches of its Regulations or conditions of licence.

3. The Reception and Distribution of Satellite Signals

While the CRTC regulates the Canadian broadcasting system, it cannot regulate broadcasting or telecommunication signals emanating from outside Canada. There are many thousands of satellite dishes in Canada that receive signals transmitted from other countries throughout the world. The reception of satellite programming is particularly important in remote parts of Northern Canada where conventional broadcasting service is not available. It is estimated that at least 1,000 satellite channels will be available to be received in Canada by 1986.

Pornographic material is transmitted by satellite signal. The signals are received directly and by and large are not scrambled and unscrambled from satellite. The Committee heard of instances where pornographic material was seen by unsupervised children at unpredictable hours of the broadcast day. We were also told of pornographic programming providing recreational entertainment in remote work places.

We have no comprehensive idea of the full extent to which pornographic material is available by satellite. We do know, however, that it is available and that it is subject to no form of present control or regulation. Obviously, any initiative taken by Canada will have to be at least bilateral and more appropriately multilateral.

Canada and the United States reached agreement in November, 1972 on the provision of telecommunication services by carriers who operate domestic satellite systems in the two countries and updated the agreement by the exchange of diplomatic letters on August 24, 1982. However, no such agreement has been reached regarding broadcast programming. Indeed, the recent exchange of diplomatic letters confirms that nothing in them, shall

> derogate from the authority of [the] respective governments and regulatory authorities to authorize and regulate the reception and distribution in their own country of radio and television programming services originating in the other country and carried on a fixed satellite service.

Given the concerns we have heard expressed by those who have had experience with the pornographic programming available by satellite reception, it is surprising that there has not been an official expression of similar concern between Canada and the United States about such transborder program content.

There is an important distinction to be made between the *reception* of a satellite signal and the *distribution or redistribution* of that same signal. At the moment, the CRTC has no jurisdiction in either area.

As far as we are aware, based on information given to us at the public hearings and from the CRTC, it appears that there are two typical situations in which individuals and companies receive broadcast signals by satellite dish or antenna and then either redistribute or distribute the same signal: firstly, those who redistribute the signal by cable network to subscribers, and secondly, hotels, apartment buildings or condominiums which receive the signal and distribute it within their premises.

The provisions of Bill C-20 would give the CRTC the power to licence and regulate the first situation but not the second.

To accomplish this result, Bill C-20 adds to section 2 of the *Broadcasting Act* a section that provides that any person who,

> ...transmits or distributes by means of telecommunication, otherwise than solely as a telecommunication common carrier and whether or not for any consideration, any programming received by radio-communication is deemed to be carrying on a broadcasting undertaking.[47]

When Bill C-20 was introduced, the Minister of Communications asked the CRTC to assist the Department and the Government in the implementation of its policy approach. The CRTC has responded by establishing a Task Force to examine and make recommendations on the distribution in underserved Canadian communities of satellite-received broadcasting services. It was expected that the Task Force's work would be completed by mid-February, 1985 and that its report would be received shortly thereafter.

In asking for the Commission's assistance, the Minister made the following point:

> In order to preserve the integrity of the broadcasting system, the continued distribution of unauthorized American specialty services, without payment to the program originators, cannot be permitted.[48]

The suggestion implicit in the comment is the investigation of some system that would require the originator's consent before a program could be received by satellite antenna. In this connection, the Chairman of the CRTC made the following answer when asked by a Member of Parliament what recommendations he had with respect to suitable international controls or regulation of satellite broadcasting:

> ...to answer your question I will probably have to look at a broader picture than only the question of pornography on satellites. I would think — and it is my personal view...the best thing that could happen to protect the artists, to make sure we do not have pornography available everywhere in Canada, or everywhere in the world — I do not think an international agreement would be easy to reach on that. I think the only means would be to try to convince people that they have some interest in scrambling their signal. If the owners of those signals were convinced of that, that they should scramble their signal, you would have a chance to control who gets it and who does not get it. I think it would probably be a more practical way of controlling that.
>
> I would imagine a lot of countries would resist the idea of trying to put some kind of limitation on what could be on their satellites. They are not all organized as we are here, and their [regulatory bodies] do not all have the same kind of responsibility that we have here with the CRTC.
>
> But I think if you look at the copyright problem, if you look at the commercialization of those services, you will find enough justification there to sell the idea that those services — that all services on satellites should be scrambled in one way or the other. It could be a very sophisticated means, or it could be a more simple one, but if we could get that, I think it would solve a lot of these problems, including the question of pornography.

The approach suggested by the Chairman of the CRTC has practical validity. If the originators of the signals can be convinced to scramble their signals, only subscribers with descramblers will be able to receive them. Such a system could be reinforced by the domestic law making it an offence to receive a signal that has not been purchased or which has been obtained without the consent of the originator.

The important question of whether the program content transmitted by satellite should be controlled remains open along with the questions of who should exercise control and under what circumstances.

4. Bill C-20

A significant aspect of the proposed amendments to the *Canadian Radio-Television and Telecommunications Act* in Bill C-20 is the expanded power it will give to the Governor in Council to provide "direction" to the CRTC.

The Minister of Communications said in the House in the course of introducing the Bill:

> Part I of the bill amends the CRTC Act to enable the Governor in Council to give binding policy directions. Those directions would be laid before Parliament and it would have the opportunity to take them under advisement before they are formally put into effect.
>
> Although the 1968 legislation setting up the CRTC did not generally grant that power to the government, I think it is necessary today to specify that the government and not the CRTC should develop the broadcasting and telcommunications policies. That position is supported by the provinces, the industry and the Commission itself. Moreover, it was ratified by the Lambert Commission and one of its specific recommendations was as follows:
>
>> The constituent act of Independent Deciding and Advisory Bodies contain provisions allowing for policy directives from the Governor in Council.
>
> This principle was also supported in 1980 by a special parliamentary committee of the House of Commons on Regulatory Reform as follows:
>
>> — that Cabinet can issue binding policy directives...to the Canadian Radio-Television and Telecommunications Commission.
>
> The relation between the government and the Commission has been under review for many years. If there is an aspect of the review that public debate has brought out, it is that the government should be responsible for the drawing up of policy and that the CRTC should be in charge of its implementation within the legislative framework set up by Parliament. The division of powers between the government and the Canadian Radio-Television and Telecommunications Commission reflects the democratic principle that the government alone is entitled to develop the main policies of the country because of its accountability to the electorate through Parliament.
>
> The government having the power to give formal directions to the CRTC, will implement its policy in the telecommunication and broadcasting areas. If it did not have that power, it could have no influence on the development of policy and consequently could not be called to account. As in the present legislation, it could only react after the fact and ask for reconsideration of specific decisions made by the CRTC."

At the present time, the Governor in Council may give directions to the Commission only with respect to any conditions of licence to the CBC (section 17(3)), requiring all licensees to broadcast a program deemed to be of urgent importance to some or all Canadians (section 18(2)), or the maximum number and reservation of channels or frequencies within a designated geographical area, or the actual classes of applicants to whom licences may be issued, amended or renewed (section 22(1)(a)).

The amendments are, therefore, very significant and will likely have a fundamental effect on the Commission's work. Of course, because the Commission's objects have always been to implement broadcast policy as expressed in section 3 of the *Broadcast Act*, Parliament has always had the power to determine the CRTC's policy direction. But the effect of the proposed amendments will be to give to the Cabinet the specific power to give binding policy directions. The only exception is with respect to "the issuance of a broadcasting licence to a particular person or the amendment or renewal of a particular broadcasting licence" (section 1 adding section 14.2 to the *CRTC Act*). The Commission's power remains exclusive in this sensitive area.

The Bill provides that the Minister shall consult with the Executive Committee of the CRTC, "with respect to the nature and subject matter of the direction or notice" (section 1 adding section 14.5 to the *CRTC Act*) and the Cabinet direction must be laid before Parliament, "unless the direction requires only that the Commission hold hearings or make reports on any matter" (section 1 adding section 14.4 to the *CRTC Act*). The Commission cannot act on any direction until 30 days after the direction has been laid before both Houses of Parliament (section 1 adding section 14.2 to the *CRTC Act*).

There can be no doubt that under the amendments, virtually all aspects of the Commissions's work are potentially the subject of Cabinet direction. Given the requirement that directions must be laid before Parliament, it is clear that the regulation provided by the CRTC will come under increased public scrutiny. It may well be that, as a result, the policies pursued by the Commission will be more responsive to the public mood and more easily changed. In the terms of program content, it remains to be seen whether, over time, the new technique of issuing policy directions will succeed.

The Cabinet could conceivably direct the Commission with respect to the conditions of licence, the substance of program content regulations, and even the suspension or revocation of a licence. It will be for the Cabinet and the CRTC to determine how the always delicate balance between the executive branch and the regulating agency is to be effectively managed.

Footnotes

[1] *The Broadcasting Act*, S.C. 1967-8, c.25, s.2.

[2] *Ibid.*

[3] *Ibid.*, s.3(f).

[4] *Ibid.*, s.3(g).

[5] *The Canadian Radio-Television and Telecommunications Commission Act*, S.C. 1975, c.49.

[6] *The Broadcasting Act*, S.C. 1967-8, c.25, s.16.

[7] *Ibid.*, s.5.

[8] *Ibid.*, s.8.

[9] *Ibid.*, s.14.

[10] *Ibid.*, s.17.

[11] *Ibid.*, s.16(1)(c).

[12] *Ibid.*, s.19(1).

[13] *Ibid.*, s.19(2).

[14] *Ibid.*, s.19(7).

[15] *Ibid.*, s.21.

[16] *Ibid.*, ss.26(1) and (5). The appeal can only be brought with leave of the Federal Court of Appeal. Application for leave must be made within one month of the making of the decision under appeal.

[17] *Ibid.*, s.23(1).

[18] *Ibid.*, s.23(3).

[19] *Ibid.*, s.23(4).

[20] *Ibid.*, s.24.

[21] *Ibid.*, s.31.

[22] (1971), F.C.R. 498, at 513.

[23] House of Commons, Hansard: 31 Jan. 1985, at 1848.

[24] *The Broadcasting Act*, S.C. 1967-8, c.25, s.17(1)(2).

[25] Transcript of Minutes of Proceedings, at 4-6.

[26] The *Broadcasting Act*, S.C. 1967-8, c.25, ss. 16(1)(b)(i), 16(1)(b)(ix).

[27] CRC, Vol. IV, c.379, at 2559 (Regulation 5) and CRC, Vol. IV, c.380, at 2582 (Regulation 6).

[28] CRC, Vol. IV, c.381, at 2606.

[29] *R.* v. *Buffalo Broadcasting Co. Ltd.* (1977), 36 C.P.R. (2d) 170 (Sask. Prov. Ct.).

[30] *R.* v. *C.K.O.Y.* (1978), 90 D.L.R. (3d)1 (S.C.C.).

[31] *Ibid.*, at 9.

[32] *Ibid.*, quoting from Evans, J.A., 70 D.L.R. (3d) 662, at 667.

[33] *Ibid.*,

[34] *Ibid.*, at 10.

[35] *Ibid.*, quoting from Brooke J.A., 70 D.L.R. 662, at 672.

[36] *Ibid.*,

[37] SOR/84-786.

[38] SOR/84-787.

[39] SOR/84-788.

[40] SOR/84-797.

[41] Transcript of Minutes of Proceedings, at 417.

[42] *The Broadcasting Act*, S.C. 1967-8, c.25, s.29(1).

[43] *Ibid.*, s.29(3).

[44] *Ibid.*, *The Broadcasting Act*, S.C. 1967-8, c.25, s.19(2)(c).

[45] *Ibid.*, s.17.

[46] Bill C-20, 30th Parl., 3rd Sess., 1977, Part II, s.5.

[47] *Ibid.*, s.2.

[48] Excerpts from a letter released by the Department of Communications to the CRTC on December 20, 1984.

[49] House of Commons, Hansard: 31 Jan. 1985, at 1847.

Chapter 13

Human Rights

There now exists in Canadian human rights legislation and jurisprudence some attempt to deal with pornography as a human rights or "hate propaganda" issue.

Most *Codes* contain prohibitions against discrimination in employment or in access to services or facilities available to the public. Human rights jurisprudence has developed to the point of holding that the creation in the workplace of an atmosphere of harassment based, say, on race is a form of discrimination.[1]

The same jurisprudence was extended to sexual harassment.[2] Now, in some *Codes*, there are explicit formulations of a prohibition against racial or sexual harrassment. An excellent example of this type of provision is that found in the *Canadian Human Rights Act*.[3] Section 13.1 of that *Act* provides:

> (1) It is a discriminatory practice,
>
> (a) in the provision of goods, services, facilities or accommodation customarily available to the general public,
>
> (b) in the provision of commercial premises or residential accommodation, or
>
> (c) in matters related to employment,
>
> to harass an individual on a prohibited ground of discrimination.
>
> (2) Without limiting the generality of subsection (1), sexual harassment shall, for the purposes of that subsection, be deemed to be harassment on a prohibited ground of discrimination.

Accordingly, complaints by women that pornography is an oppressive presence in their place of employment could be investigated by human rights commissions either as a complaint of sex discrimination on the "atmosphere of harassment" principle, or, under specific rules about sexual harassment where these are available. Indeed, many employers and unions may now be addressing the issue of pornography in the workplace as part of sexual harassment policies developed in response to human rights legislation. In the 1984 decision of the Canadian Human Rights Tribunal dealing with allegations of sex-based discrimination by Canadian National Railways, specific mention was made of the success of the in-house policy on sexual harassment in clearing up women's complaints about pornography in the workplace.[5]

There have been no reported cases dealing with pornography as discrimination in the educational setting or in public facilities. However, it seems that the jurisprudence developing the idea that pornography can create a discriminatory atmosphere may be applicable in this sphere too. The presence of pornographic materials in a store to which the public has access may, arguably, create a different access to that facility for women and for men. It may be that such a distinction could give rise to a successful complaint. The same reasoning might also extend to educational facilities.

We consider it desirable for human rights commissions themselves to review this issue, and to formulate the same kinds of guidelines with respect to sexual harassment in services and facilities as many of them have with regard to sexual harassment in employment.

The *Saskatchewan Human Rights Code*[6] provides in subsection 14(1) that:

> 14. (1) No person shall publish or display or cause or permit to be published or displayed, on any lands or premises or in a newspaper, through a television or radio broadcasting station or any other broadcasting device or in any printed matter or publication or by means of any other medium that he owns, controls, distributes or sells, any notice, sign, symbol, emblem or other representation tending or likely to tend to deprive, abridge or otherwise restrict the enjoyment by any person or class of persons of any right to which he is or they are entitled under the law, or which exposes, or tends to expose, to hatred, ridicules, belittles, or otherwise affronts the dignity of any person, any class of persons or a group of persons because of his or their race, creed, religion, colour, sex, marital status, physical disability, age, nationality, ancestry or place of origin.

In 1980 a complaint was filed with the Saskatchewan Human Rights Commission against the University of Saskatchewan Engineering Students' Society, alleging that an issue of the student publication *Red Eye* contained representations of women which ridiculed, belittled and otherwise affronted the dignity of women in Saskatchewan. Investigation by the Commission led to such allegations being brought against other issues of the paper. In March, 1984, a Board appointed to hear the complaints ruled that violations of the *Code* had occurred.[7]

The Board concluded after reviewing the newspapers that the form which the "ridicule" took "frequently involved material containing the allegedly humorous description or depiction of the violent destruction of women's bodies through intercourse".[8] The manner in which women were "belittled" and had their dignity affronted because of their sex was found to involve material suggesting women in educational institutions are less than human; that they are inferior human beings; that they are there to gratify male sexual desires; that they have no independent motivation or capacity to participate in social and intellectual activity. Women were found to have been belittled by being represented as mere objects, and to have been affronted by the trivializing and deriving of humour from material which promotes sexual violence and the objectification of women.

A defence based on freedom of speech was relied on in the *Red Eye* case. Subsection 14(2) of the *Code* provides that nothing in subsection 14(1) restricts the right to freedom of speech under law upon any subject.

The Board recognized the need to reconcile two competing social interests. One of these is freedom of expression, the other equality. Both are entrenched in the *Charter of Rights*, in sections 2 and 15, respectively. In trying to balance these interests, the Board took as its point of departure the judgment of the Supreme Court of Canada in *Re Alberta Legislation.*[9] Most particularly, it cited the observations of Mr. Justice Duff of that judgment that:

> The right of public discussion is of course, subject to legal restrictions; those based upon considerations of decency and public order, and others conceived for the protection of various private and public interests with which, for example, the laws of defamation and sedition are concerned. In a word, freedom of discussion means to quote the words of Lord Wright in *James v. Commonwealth of Australia* "freedom governed by-law".[10]

Although it recognized that subsection 14(1) does not prohibit every type of insult to a protected class, and affirmed that great caution must be used before making any determination abridging the free expression of others, the Board concluded that where no redeeming social interest is evident the freedom of expression may be abridged. Where representations infringe upon the rights of others, such as their egalitarian rights, the Board concluded that the right to freedom of speech could be curtailed without infringing Constitutional rights.

The Board gives this exposition of the rationale for its decision, and for the legislation itself:

> This material promotes a consistent image of women as less than human. Once a protected class, in this case women, is represented as a less than equal member of the human family with impunity the grave evil exists that they may be treated as such. Material of the kind in these newspapers serves to perpetuate a social climate discriminatory to women who are already targets of manifold discrimination and horrible violence. No social interest is served by tolerating the free expression of such material.[11]

The Board also made the point, often raised in briefs to this Committee, that there would be no doubt that a violation of subsection 14(1) had occured if race, rather than sex, formed the nexus of the class against whom the offending material was directed.[12]

The Saskatchewan *Human Rights Code* provision is notable because it addresses material which exposes to hatred, ridicules, belittles or otherwise affronts the dignity of any person, group or class of persons. It is thus the broadest of the existing provisions. Interestingly, the complaint in the *Red Eye* case did not allege that the newspaper exposes women to hatred, although the remarks of the Board of Inquiry might have been fitting even if this more serious offence had been alleged.

Human rights legislation at the federal level, and in Manitoba, addresses the narrower issue of hate messages. *The Canadian Human Rights Act* provides, in section 13, that:

> (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.
>
> (2) Subsection (1) does not apply in respect of any matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking.
>
> (3) For the purposes of this section, no owner or operator of a telecommunication undertaking communicates or causes to be communicated any matter described in subsection (1) by reason only that the facilities of telecommunication undertaking owned or operated by that person are used by other persons for the transmission of such matter.

In section 2 of the *Manitoba Human Rights Act*,[13] we find the following provision:

> (1) No person shall
>
> (a) publish, display, transmit or broadcast, or cause to be published, displayed, transmitted or broadcast; or
>
> (b) permit to be published, displayed, broadcast or transmitted to the public, on lands or premises, in a newspaper, through television or radio or telephone, or by means of any other medium which he owns or controls;
>
> any notice sign, symbol, emblem or other representation
>
> (c) indicating discrimination or intention to discriminate against a person; or
>
> (d) exposing or tending to expose a person to hatred;
>
> because of the race, nationality, religion, colour, sex, marital status, physical or mental handicap, age, source of income, family status, ethnic or national origin of that person.

Interestingly, these provisions in the human rights legislation of Canada, Manitoba and Saskatchewan protect against exposure to hatred on a substantial number of grounds, including "sex". By contrast, the hate message provisions of the *Criminal Code*, found in sections 281.1 and 281.2, protect identifiable groups distinguished only by colour, race, religion or ethnic origin.

Two jurisdictions confer rights of action on groups or members of groups in the case of incitement to hatred or similar harms. The Manitoba *Defamation Act*[14] provides in subsection 19(1) that:

> (1) The publication of a libel against a race or religious creed likely to expose persons belonging to the race, or professing the religious creed, to hatred, contempt or ridicule, and tending to raise unrest or disorder among the people, entitles a person belonging to the race, or professing the religious

> creed, to sue for an injunction to prevent the continuation and circulation of the libel; and the Court of Queen's Bench may entertain the action.

The action may be brought against the person responsible for the authorship, publication, or circulation of the libel. Subsection 19(4) provides that no more than one action shall be brought in respect of the same libel.

The British Columbia *Civil Rights Protection Act, 1981,*[15] confers fairly extensive rights to sue for remedies against persons who commit a prohibited act.

In subsection 1(1) of the *Act*, "prohibited act" is defined as:

> any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting
>
> (a) hatred or contempt of a person or class of persons, or
>
> (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
>
> on the basis of colour, race, ethnic origin or place of origin.

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of person against whom the prohibited act was directed, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

The *Act* also provides that the Attorney General may intervene in an action under section 1. A person bringing such an action is required to serve the Attorney General with notice of the action, presumably to permit him or her to decide whether to intervene.

This legislation was passed in 1981, after a problem had arisen in the province concerning the activities of the Ku Klux Klan. A *Report Arising out of the Activities of The Ku Klux Klan in British Columbia* prepared in 1981 by lawyer John McAlpine, Q.C., had recommended amendment of the British Columbia *Human Rights Code* to permit the Human Rights Commission to handle complaints of hate messages. Interestingly, the report specifically stated that they were not recommending legislation to encompass messages based on sex or marital status. The reason for refraining from such a recommendation was quite specific: Mr. McAlpine's appointment arose as a consequence of a concern of minority groups with the Klan message on the basis of race, religion and ethnic origin. He identified these forms of discrimination as "actual and threatening" and thus warranting remedial legislation.[16] The Report recognized, however, that there might be a need to expand the protection in the future should the messages of the Klan reach out to encompass other groups.

Although the form of legislative action which eventually was proceeded with in British Columbia differed from that recommended in the McAlpine Report, this glimpse of Mr. McAlpine's reasoning for specifying that these particular grounds alone be protected is an interesting one. Consider that the amendments which introduced section 13 of the *Canadian Human Rights Act* came in response to anxiety about the activites of an anti-Zionist producer of telephone hate messages in Toronto, and that the provisions of the *Criminal Code* themselves were enacted following concern over hate propaganda being disseminated about particular religious and racial groups. Upon such consideration, one sees that the possible relevance of such provisions to hate messages involving other groups, like women, was not uppermost in the minds of the proponents of this legislation. Arising out of an immediate situation, it dealt only with that situation. There has not, to our knowledge, been a principled discusssion, and rejection, of the idea of extending this legislation to protect against messages aimed at women.

There have, however, been general considerations in recent years of measures directed against hate messages. In 1984, a report on *Group Defamation* prepared for the Attorney General of Ontario by Patrick Lawlor, proposed that the Ontario *Human Rights Code* be amended to permit a remedy for persons and groups who are exposed to hatred. Mr. Lawlor chose the *Human Rights Code* as the repository for this remedy because he considered that its tenor and temper best accords with the nature of the evil to be remedied, which he described as psychic and spiritual blows, no less traumatic because relatively intangible.[17] The Ontario goverment has not proceeded with any amendment to the *Code* in this area.

Equality Now!, the Report of the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, released in 1984, addressed a number of recommendations to the question of remedies for hate messages. One of the central features of these recommendations was a push for improvement of the existing *Criminal Code* provisions about hate messages. However, the Committee also made a number of suggestions for improvements and extensions of human rights treatment of this problem.

The Committee proposed in Recommendation 38 that the *Canadian Human Rights Act* be amended to allow the Canadian Human Rights Commission to deal with hate propoganda. The Committee referred to this approach as "more timely and less cumbersome" than some other methods of dealing with hate literature, particularly than the *Criminal Code* route. The Committee pointed out that Commission handling of complaints means that the need of the complainant for a lawyer, and "other legal requirements involved in an ordinary prosecution", will be eliminated.[18]

Interestingly, however, the Committee also records the complaints of witnesses before it that once a complaint has been lodged with the Human Rights Commission, they lose control of how it is processed. This, according to the witnesses, often results in lengthy delays between the filing of the complaint and its final resolution. Accordingly, Recommendation 43 of the Committee urges the federal and provincial governments to amend their anti-discrimination laws to allow a complainant the option of instituting civil litigation against a discriminator rather than making a complaint to Human Rights Commission.[19]

Neither the Lawlor Report nor *Equality Now!* addresses the issue of hate messages against women, or, specifically, pornography It appears to us as if the interest in using hate message remedies to address pornography arose well after the interest in hate literature protections against racial and religious minorities had been put on the social agenda. The interest in the human rights, or hate literature, approach to pornography has in great measure arisen from the work of two American thinkers, Catharine MacKinnon and Andrea Dworkin. This work has generated considerable enthusiasm in Canada, and was referred to often by persons appearing at the public hearings. In Section IV, Chapter 25, we examine the implications of this approach for Canadian law, and discuss the extent to which we believe it should be adopted.

Footnotes

[1] In *Simms* v. *Ford of Canada* 4 June 1980 (Ontario Human Rights Code Board of Inquiry), unreported, Professor Krever, as he then was, wrote that "discriminate" includes making the employee's working conditions different from those under which other employees work. He stated that to permit a black employee in a plant where the majority of the employees are white to be humiliated repeatedly by insulting language relating to his colour would be to require him to work under unfavourable conditions which do not apply to white employees.

[2] Arbitrator Owen Shime in *Re Bell and Korczak* (1980), 27 L.A.C. (2d) 227 (Ontario) gave, at 229, a statement of the rationale for the rule against sexual harassment. Widely accepted by other arbitrators, this observation was that "the forms of prohibited conduct that, in my view, are discriminatory run the gamut from overt gender-based activity, such as coerced intercourse to unsolicited physical contact to persistent propositions to more subtle conduct such as gender-based insults and taunting, which may reasonably be perceived to create a negative psychological and emotional work environment." Arbitrator Katherine Swinton in *Re C.U.P.E. and O.P.E.I.U. Local 491* (1982), 4 L.A.C. (3d) 385 described, at 399, "conditions of work" harassment. As developed by Catharine MacKinnon, this concept means that the work environment becomes unpleasant or unbearable because of a pattern of insults and hostility to women, which is intolerable to the victim. The negative work environment may be the result of either the victim's refusal of a sexual advance, or the attitude of supervisors and co-workers to women.

[3] *Canadian Human Rights Act*, S.C. 1976-77, c.33, as amended by S.C. 1977-78, c.22, s.5; S.C. 1980-81, c.54, Schedule; S.C. 1980-81-82, c.111, Schedule IV, s.2; S.C. 1980-81-82-83, c.143; and S.C. 1983-84, c.21, ss. 73 and 74.

[4] Enacted by S.C. 1980-81-82-83, c.143, s.7.

[5] *Action Travail des Femmes* v. *Canadian National; Canadian Human Rights Commission, Intervenant*, TD 10/84 (August 22, 1984), at 131.

[6] R.S.S. 1978, c. S-24.1, as amended.

[7] *Saskatchewan Human Rights Commission* v. *The Engineering Students' Society, University of Saskatchewan et al*, March 7, 1984 (Red Eye Decision).

[8] *Red Eye Decision*, at 49.

[9] [1938] S.C.R. 100.

[10] Quoted in: *Red Eye Decision* at 25.

[11] *Ibid.*, at 51-52.

[12] *Ibid.*, at 23.

[13] S.M. 1974, c.65.

[14] R.S.M. 1970, c.60.

[15] S.B.C. 1981, c.12.

[16] John D. McAlpine, *Report Arising Out of the Activities of the Ku Klux Klan in British Columbia* (April 30, 1981), at 61.

[17] Patrick Lawlor, *Group Defamation* (1984), para. 6 at 72.

[18] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 72.

[19] *Ibid.*, at 72.

Chapter 14

Film Classification and Censorship

1. Introduction

We have not undertaken either extensive or intensive studies of classification and censor board practices in Canada, because the major focus of our mandate is on the federal level of government. However, the questions of the scope of provincial activity in the regulation of films, and the appropriate stance of the federal criminal law, are closely related to one another. Witnesses at our public hearings commented, often unhappily, about the activities of classification and censor boards, or what was sometimes seen as the lack of activity of such boards.

We have accordingly analyzed the legislation and regulations governing provincial classification and censorship of films, and reviewed the empirical information on selected board activities presented by the Badgley Committee,[1] and by Professor Neil Boyd as part of the Department of Justice research program on pornography and prostitution.[2] We have also had the opportunity to meet with Mary Brown, Director of the Ontario Film Review Board, Mary Louise McCausland, Film Classification Director of British Columbia, and the Director and some members of the Québec Bureau de Surveillance du Cinéma. While the details we have gathered are by no means exhaustive, we think that we have been able to form a clear enough impression of provincial activity to appreciate its significance to any overall effort to deal with offensive material.

The provinces of Nova Scotia, New Brunswick, Québec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia have legislation providing for regulation of films which are being shown publicly.[3] Some of these schemes apply as well to videotapes which are being shown publicly.[4] Ontario and Nova Scotia have recently included sale and rental of videotapes for private consumption in their regulatory schemes.[5] Newfoundland has passed legislation providing for a film censorship board but the board has not been established;[6] Newfoundland adopts the rules of the New Brunswick Film Classification Board. So, too, does Prince Edward Island.[7]

The Northwest Territories and the Yukon do not have film classification boards. Although the arrangement to do so is relatively informal, these jurisdictions usually look to the rulings of the Alberta and British Columbia boards, respectively. Sometimes, the rulings of other boards will also be canvassed by Northwest Territories officials.[8]

Typically, provincial legislation providing for film classification establishes an authority to which all films intended for exhibition in the province must be submitted. Theatre owners are forbidden from exhibiting a film which has not been reviewed and classified, and from altering a film after it has been reviewed and classified. Similarly, in most jurisdictions, there is a prohibition against an operator altering a classification once it has been bestowed by the board.

2. Banning or Prohibiting Films

Most of the provincial legislation in this field authorizes the film boards to prohibit as well as to regulate the display of films in the province. The legislation of Nova Scotia, New Brunswick, Ontario, Alberta, Saskatchewan and British Columbia includes this power to prohibit showing of a film.[9] In a case involving the Nova Scotia Board of Censors, predecessor to the present Amusements Regulation Board, the Supreme Court of Canada held in a five to four decision that the provinces do have the constitutional authority to permit these authorities to prohibit exhibition of films.[10]

In most of the provinces which feature a power to prohibit the showing of films, the legislation does not contain any standards upon which the reviewing authority is to make the decision whether to ban the film. The exception is Ontario. Subsection 35(2) of the *Theatres Act*, enacted in 1984,[11] provides that the Ontario Film Review Board may refuse to approve a film for distribution or exhibition in Ontario "in accordance with the criteria prescribed in the Regulations". Subsection 35(3) adds that the Board may make its approval conditional on the film being exhibited on specified dates in designated locations only.

In the Ontario Regulation, it is provided that after viewing a film, the Board may refuse to approve it for exhibition or distribution in Ontario where the film contains:

> (a) a graphic or prolonged scene of violence, torture, crime, cruelty, horror or human degradation;
>
> (b) the depiction of the physical abuse or humiliation of human beings for purposes of sexual gratification or as pleasing to the victim;
>
> (c) a scene where a person who is or is intended to represent a person under the age of 16 years appears,
>
> (i) nude or partially nude in a sexually suggestive context, or
>
> (ii) in a scene of explicit sexual activity;
>
> (d) the explicit and gratuitous depiction of urination, defecation or vomiting;
>
> (e) the explicit depiction of sexual activity;

(f) a scene depicting indignities to the human body in an explicit manner;

(g) a scene where there is undue emphasis on human genital organs; or

(h) a scene where an animal has been abused in the making of the film.[12]

Sexual activity means acts, whether real or simulated, of intercourse or masturbation, and includes the depiction of genital, anal or oral-genital connection between human beings or human beings and animals, and anal or genital connection between human beings by means of objects.[13]

Subsection 21(1) of the new Regulation states that in exercising its authority to prohibit the exhibition of films, the Board shall consider the film in its entirety and take into account the general character and integrity of the film.

These features of the Ontario legislation were introduced following a successful challenge to the former provisions under the *Canadian Charter of Rights and Freedoms.*[14] Subsection 3(2)(a) of the *Theatres Act* had simply provided that the Board of Censors, as it was then known, had power to censor any film, and subsection 3(2)(b) provided that, subject to the regulations, it could approve, prohibit, or regulate the exhibition of any film in Ontario. There were no regulations setting out what would cause a film to be banned in the province, although the Board had published informal guidelines stating its criteria. The Ontario Court of Appeal held that the power to censor and prohibit was a restriction on the right of freedom of expression guaranteed by the *Charter of Rights*. The guidelines, not being embodied in law at all, would not assist the Board in establishing that the restriction on the *Charter* right was, as required by section 1 of the *Charter*, a "reasonable limit prescribed by law."

The Ontario decision may well have implications for those other provinces that permit the banning of a film in the province without specifying the grounds on which it will be banned.

Two provinces do not permit the banning of films. In Manitoba, the film classification board is authorized only to classify films.[15] The Bureau de Surveillance du Cinéma of Québec is given no express power to prohibit the showing of films.[16]

3. Cutting Films

Much of the provincial legislation affecting film classification also permits the reviewing authority to make cuts in films which are submitted for review. In Ontario and Saskatchewan, the board is empowered to remove from the film, any portion that it does not approve of for exhibition or distribution, when authorized to do so by the person submitting the film for approval.[17] A similar proviso exists in British Columbia, but there, the removal of the offending portion is explicitly said to be as a condition of approval of the film for showing.[18]

The Nova Scotia Amusements Regulation Board is given wide powers to authorize the use of any film with "such changes as it may direct".[19] Similar broad power is conferred on the Alberta Board of Censors, which may eliminate any subtitles, words, or scenes that it considers objectionable before the issue of a certificate for the exhibition of the film.[20] We understand, however, from the research of the Badgley Committee, that the Board does not exercise this power to cut films.[21] The New Brunswick Film Classification Board has this wide power in a slightly different guise. It indicates to would-be exhibitors the changes to be made in order to meet the approval of the Board.[22] The act of cutting is thus done by the exhibitor, but the Board's power to insist on cuts is no less broad than in the cases where the board itself cuts, with or without the approval of the exhibitor.

In keeping with its authority only to classify, the Manitoba Film Classification Board has no power to cut films, or to require that they be cut. The Québec Bureau de Surveillance du Cinéma does not possess any explicit power to cut films. It is our understanding that persons wishing to show films in Québec, will sometimes find themselves going back to the copyright holder to request that changes or deletions be made to the film, so that it can be approved for showing in the province. This situation arises because it is forbidden to exhibit a film in the province without a visa from the Director. The visa may be withheld until a version of the film suitable for showing is presented.

It would appear as if the power to cut films is not subject to any standards contained in provincial legislation. In Ontario, the new legislation articulates the standards to be applied when considering whether a film should be prohibited and these same standards may apply to deletions. However, it is not immediately obvious from the Regulation that they do. The omission from the legislation or regulations of standards upon which decisions about cutting shall be made seems to open this aspect of the provincial schemes to the same charge of limiting freedom of expression otherwise than by law.

4. Practices of Selected Boards

Professor Neil Boyd studied the practices of four Canadian boards with respect to prohibiting films from being exhibited, namely those in British Columbia, Ontario, Québec, and Nova Scotia. Included in his review was information about provincial policies on banning films and on the issue of deletions from films. Interestingly, the four boards differed among themselves on the amount of information provided to the public about refusals of permission to exhibit, and about elimination of scenes. Both British Columbia and Ontario publish reports of cuts requested; Nova Scotia and Québec do not. In the case of Québec, the non-publication of such a report is attributed to the review process itself. A film may be refused more than once as part of the overall process of negotiation between distributor and board leading to eventual approval for exhibition. It is considered meaningless to publish statistics of the overall number of refusals, which will not distinguish outright refusals from those which are part of the bargaining.[23]

The standards employed to assess suitability of a film vary from province to province. In Ontario, the Director stated in the 1982-83 annual report of the Theatres Branch that very graphic or prolonged scenes of violence, torture, bloodletting, explicit portrayal of sexual violence, explicit portrayal of sexual activity, undue or prolonged emphasis on genitalia and ill treatment of animals, would normally be considered to contravene community standards. Elimination of such scenes would be requested before exhibition of the film.[24] These items of concern are now, for the most part, embodied in the 1985 Regulation under the *Theatres Act*. One of the Board's major concerns is sexuality and children;[25] its banning of *Pretty Baby* and requirements of cuts to *The Tin Drum* have been centres of controversy in recent years.

In Nova Scotia, the rejection of a film may occur when there is no real story but prolonged explicit portrayal of sexual activity, sexual exploitation of children, undue and prolonged scenes of violence, torture, bloodletting, ill treatment of animals, and undue or prolonged emphasis on genitalia.[26]

In British Columbia, the key variables for film review are penetration, ejaculation and violence. Interestingly, explicit scenes of both fellatio and cunnilingus are permitted by the Board, but scenes involving penetration or ejaculation are prohibited.[27]

Québec authorities regard explicit sexuality between consenting adults as acceptable or tolerable. Unlike British Columbia, Québec allows presentation of films containing penetration or ejaculation. Sexuality, per se, is not a target for elimination, but images of sexual violence are.[28] In recognition of the pluralistic and changing nature of society, the Bureau does not keep in place specific and inflexible criteria. However, it is guided by two principles: judgment is not passed on films according to their themes, but upon the manner in which they are treated; and respect is given to the goals of protecting minors and maintaining freedom of choice for persons 18 years of age or older.[29]

The Manitoba Film Classification Board does not cut or prohibit films. In that province, a film will be given a "Restricted Adult" classification if it contains depictions of any of the following: oral sex, fellatio, buggery, cunnilingus, penetration, bestiality, masturbation, ejaculation, actual portrayal of child pornography, graphic portrayal of genital close-ups, or extreme acts of violence with sexual activity.[30]

It is interesting to note how the different boards, proceeding from these varying points of view, respond to a particular film. The Louis Malle film *Pretty Baby*, starring Brooke Shields in an account of a 12 year old prostitute, was approved in British Columbia, Nova Scotia and Québec, but not in Ontario. The National Film Board of Canada film, *Not a Love Story*, a documentary on sexual exploitation in pornography that has been a strong force in mobilizing anti-pornography sentiment in Canada, was approved for showing in Québec, and exempted from review in British Columbia. In Ontario and Nova Scotia, however, it was not approved for commercial showing. In these two provinces, it was licensed for educational purposes only.[31] The film *Caligula* also received diverse treatment in Canadian jurisdictions. The American version of the film was shown with cuts in Québec, and without cuts in British Columbia. The British version was approved without cuts in Alberta, Manitoba, Saskatchewan, and New Brunswick, and with cuts in Ontario. In Nova Scotia, the Board refused to approve the British version, with cuts, that had been shown in Ontario.[32]

5. Classifying Films

In addition to the jurisdiction to prohibit and to cut films, provincial authorities also exercise a power to review and classify films. Each film shown in the province must be classified, and the classification must be displayed at the theatre and in advertising related to the film. It is apparent from an examination of the classification systems of the various provinces, that the aim of such systems is to keep children and young people from seeing that which is considered unsuitable for their age and maturity. The classification approach as a whole, as well as some particular aspects of it, makes it clear that the success of classification depends on the involvement of parents or other adults responsible for children.

Some provincial regimes include in the legislation not only a list of the various classifications which apply in the province, but also a description of the scope of the various classifications. The Ontario *Theatres Act* sets out in a new subsection 3(8), enacted in 1984, the four categories used in Ontario, with the nature of each.[33] The "Family" classification is given to films which are appropriate for viewing by a person of any age. "Parental Guidance" is to indicate that in the Board's opinion every parent should exercise discretion in permitting a child to view the film. "Adult Accompaniment" is for films to be restricted to persons 14 years of age or older, or to persons younger than 14 who are accompanied by an adult. "Restricted" films are those restricted to persons 18 years of age or older.

The British Columbia *Motion Picture Act* sets out the classifications with a description of each: "General" (suitable for all persons), "Adult" (unsuitable for or of no interest to a person under the age of 18) and "Restricted" (suitable only for a person 18 years of age or over).[34] The British Columbia Film Classification Board is also experimenting with a fourth classification which is referred to as "14 years". The effect of this classification is that no one under 14 can be admitted to the movie unless accompanied by an adult.

Manitoba is the only other jurisdiction where the statute itself contains information about not only the classifications, but also the basis upon which they may be arrived at. Subsection 23(2) of the *Amusements Act* provides that the Film Classification Board shall classify any film or slide which in its opinion is unsuitable for viewing by children or by a family by reason of sex, nudity, violence, foul language or other reason, in such a manner that the film or slide shall be restricted to viewing only by persons 18 years of age or over.[35]

The Regulations then elaborate upon the classification scheme, which involves five headings. "General" denotes acceptable for all audiences, without consideration of age, and "Mature" means suitable only for adults or mature young people because of theme, content or treatment that might require more mature judgment by viewers. No age limit is attached to the "Mature" category, but the Regulation provides that an element of this classification is that parents would exercise discretion in deciding whether to let young people see the film. Films classified as "Adult Parental Guidance" are not to be shown to persons under the age of 18 unless accompanied by a parent, or adult guardian, because of theme, content, or treatment. "Restricted Adult" films are those which shall not be viewed by persons under 18 because of theme, content or treatment.[36]

The Alberta *Amusements Act* provides for the making of Regulations classifying films as "family pictures" or "pictures for universal exhibition" or for any other system of division.[37] The system contained in the Regulations features four categories of film. "General" and "Parental Guidance" are those suitable for all ages, "Mature" films are those which persons under 14 cannot see unless accompanied by an adult, and "Restricted Adult" films are those restricted to persons over the age of 18.[38]

The *Theatres and Cinematographs Act* of Saskatchewan requires that the Film Classification Board classify all films presented to it as "General", "Adult", "Restricted Adult" or "Special X",[39] but neither the *Act* nor the Regulations give any indication of the basis on which that classifying is to be done. Classifications in Nova Scotia are "General", "Adult" and "Restricted". These three are set out in the Regulations,[40] rather than the *Act*, and there is no indication in either the *Act* or the Regulations as to how they will be applied. The same three categories of Restricted, Adult, and General appear to apply in New Brunswick,[41] but no specific provision is made to this effect in either the *Act* or the Regulations.

There is, overall, considerable similarity in the basic approach of the classification systems. All feature a General category, suitable for all viewers, and a Restricted category to which only those 18 or over will be admitted. Another commonly used dividing line is the age of 14; some systems contain a category of films in respect of which parental guidance or adult accompaniment is required for those under 14.

Although the outline of the classification schemes is similar from province to province, there is considerable variation in legislative treatment of the classification system. Some provinces include the basic outlines of the scheme right in the legislation, or in a combination of legislation and regulations, while others have very sketchy information about the classification system in their legislation and regulations. In all cases, we expect that the day-to-day administration of the scheme will be a lot more complicated than is revealed in the Acts and Regulations. How people get information about the criteria which the classification authorities are using thus becomes an important question, just as it is in the case of prohibition and cutting of films. Not only the would-be exhibitor of films, but also citizens interested in particular decisions or in the process as a whole, may have a difficult time finding out what is going on.

6. Display of Classification Information

The legislation of most provinces requires that the classification given to a film by the board be displayed. These display requirements may encompass both a requirement to state the classification in advertisements for the film, and a requirement to show the classification at the entrance to the theatre. Some jurisdictions require only one or other of these methods. The legislation of two jurisdictions goes further in this effort to alert the public to the sort of material which they can expect to see inside the theatre.

The *Theatres and Cinematographs Regulations* of Saskatchewan require that in addition to classifying a film, the Film Classification Board shall determine whether the public should be warned of potentially offensive scenes, language or violence contained in any film.[42] The Board has the power to require that both the warning and the classification be included in advertising for the film and displayed at the theatre.[43]

Apart from legislation, there may be other methods used by provincial authorities to convey warnings, or information, to prospective audiences. The Ontario Board, for example, has a system of notations (i.e. "Foul language") which it attaches to films, and these appear in the advertising for such films. There does not appear to be any explicit legal authority for this practice.

7. Entrance Restrictions

The classification system is one major way in which provincial legislation attempts to keep children and young persons from material deemed inappropriate for them. The system works in conjunction with parental initiatives, providing information which the parent or other responsible adult may use to assess and influence the viewing habits of the young person.

There are, in the legislation, attempts to influence this behaviour more directly. The New Brunswick Regulation provides that a child under 10 is not permitted to attend any theatre or place of amusement except on Saturdays and statutory holiday matinees, unless accompanied by an adult. A child apparently under the age of 16 is not permitted to attend any such place after seven o'clock in the evening or during school hours, unless accompanied by an adult.[44] This prohibition, which does not depend on the type of film being exhibited, seems aimed at the conduct of the child in the same way as school truancy legislation may be. A somewhat similar provision in the Ontario legislation states that no film shall be exhibited in a theatre where a person under the age of 12 years, not accompanied by a person at least 16 years of age, is permitted to attend, unless there is in the theatre a uniformed attendant 18 years of age or older.[45]

These two provisions are the only ones along these lines which we find in provincial censorship legislation. Much more common are entrance restrictions which relate to the classification system. These may be directed toward the theatre operator, forbidding him or her to permit the entry of, say, someone under the age of 18 to a restricted performance. Or, they may be directed toward the young person directly. The *Motion Picture Act* of British Columbia provides an example of a prohibition directed to both child and adult; it provides in subsection 8(3) that unless accompanied by a parent or other responsible adult, no person under 18 shall attend or be permitted to attend a restricted film.[46]

In the case of these restrictions on entry, as in the classification systems themselves, the role of the parent or other responsible adult is recognized. A child or young person may sometimes be refused admission to a restricted performance altogether (as is the case in Saskatchewan),[47] but on the other hand, as in the British Columbia example, may be refused admission only if unaccompanied.[48] The same holds true with entry restrictions on even younger people. The Regulations of Nova Scotia prohibit a theatre owner from admitting to an "Adult" film any person under 14, unless the person is accompanied by someone 19 years of age or over.[49]

8. Advertising Controls

All of the provincial legislation relating to film censorship or review, except that of New Brunswick, requires that advertising for a particular movie also be approved by the board.

In a few jurisdictions, the legislation itself contains the standards which are to govern consideration of advertising material. The *Theatres and Cinematographs Act* of Saskatchewan, for example, prohibits any advertisement that:

> (a) gives details of a criminal action or depicts criminals as admirable or heroic characters;
>
> (b) is immoral or obscene or suggests lewdness or indecency;
>
> (c) offers evil suggestions to the minds of young people or children; or
>
> (d) is for any other reason injurious to public morals or opposed to the public welfare.[50]

The standards enunciated in the Manitoba and Alberta legislation appear, not in connection with the Board's prior review of advertisements, but rather in connection with powers conferred by the *Act* to seize and destroy materials that offend. The Manitoba *Amusements Act* allows the Film Classification Board to instruct a peace officer or inspector to remove from all public places any advertisement of an immoral, obscene, or indecent nature, or which depicts any murder, robbery, or criminal assault, or the killing of any person.[51] The Alberta *Amusements Act* permits the making of regulations permitting seizure and destruction of advertisements that are indecent or have an immoral, degrading or objectionable tendency.[52] No such regulations have been made.

A number of questions are raised by these provisions about control of advertising. Almost all have broad powers of prior restraint, and there are very few jurisdictions where there is any indication at all of the standards which will be applied in exercising those powers. The seizure provisions do not explicitly provide for any sort of hearing before the seizure and destruction of the material. These aspects of the advertising regulation provisions, raise in our minds the question of whether these could be said to be a reasonable limit imposed by law on the freedom of expression guaranteed by the *Charter of Rights*. Also at issue may well be the Charter's guarantee in section 8 against unlawful search and seizure.

9. Overview

Even this brief survey of film regulation in Canada shows what diversity of approach there exists, both with regard to the substance of the standards applied and the ensuing results, and also with regard to the degree of public accessibility of these standards. It is useful to remember that the constitutional foundation for film regulation by the provinces relies in part at least on this local diversity. Mr. Justice Ritchie of the Supreme Court of Canada stated in the *McNeil* case that in a country as vast and diverse as Canada, where tastes and standards may vary from one area to another, the determination of what is and what is not acceptable on moral grounds for public exhibition, may be viewed as a matter of a "local and private nature in a Province" and therefore within provincial competence under the *Constitution Act, 1867*.[53]

Although it may be desirable to recognize local diversity, however, this recognition leads to problems. The boundaries between the provinces are open: there are no Customs or other barriers between them. Modern technology permits the production of numerous videotapes from another tape or from a film. The combination of these two factors will permit circulation of a film, by means of videotapes for private viewing, in a province where it was not cleared for commercial showing.

Witnesses at our hearings expressed concern about this development. The potential impact of the phenomenon can be appreciated when one considers that provincial boards review many more films imported from other countries, than films produced in Canada.

10. Regulation of Videotapes

Public exhibition of videotapes is dealt with in a number of jurisdictions in the same way as public exhibition of film. In these provinces, the relevant Act or Regulation defines "film" in such a way as to include videotape, thus extending to this medium all of the provisions governing public exhibition of conventional film.[54]

However, in two jurisdictions, the regulatory scheme has been extended beyond public exhibition of videotapes to encompass sale and rental of tapes for private consumption. In both of these provinces, this has been accomplished by making changes to the regulations dealing with "film exchanges".

The first jurisdiction to bring videotapes under regulation was Nova Scotia. A regulation passed in February 1984 defined "film exchange" as including retail outlets which sell, lease, lend, exchange or distribute film to the public.[55] Film was defined as including videocassette, videodisc and videotape. The regulation requires that a film exchange obtain a licence from the Amusements Regulation Board before it can sell, lease, lend, exchange or distribute any film. The fee for the licence is very small.

A number of rules govern the activities of a film exchange. An exchange is required to mark every videofilm with the classification which the Board has given to the film; both the actual container of the film and any used for display purposes must bear a sticker with the appropriate designation, whether "General", "Adult" or "Restricted". Where the film has not been classified by the Board, a sticker bearing the word "Unclassified" must be affixed. The exchange must indicate in all advertising of a film or video the classification which the Board has given, or that the film is unclassified. The appropriate designation is also required to appear on every list of videofilms that is made available to customers.

The Regulations contain a prohibition against selling, leasing, lending, exchanging or distributing to any person under 18 a film classified as "Restricted".

One of the major problems with any scheme of video regulation is, of course, whether to require board clearance of each of the thousands of videos likely to be in circulation in a province at any given time. These Nova Scotia regulations on film exchanges appear to assume that not all the tapes will be seen by the board, because they include the "unclassified" category. This is a departure from the rules which apply to the commercial film exchanges which supply films to movie theatres. Section 18 of Regulation 130/82 under the Nova Scotia *Theatres and Amusements Act* provides that no film exchange shall sell, lease or exchange any film unless a certificate of the Board has been issued in respect of it. A film circulated without a certificate may be confiscated. One assumes that sheer practicality may have dictated the distinction.

Many tapes now in circulation are probably not reproductions of films which were shown in the province; there will thus be no certificate in respect of the work on the tape. It would be very difficult to call them all back in for certification. The same difficulty arises in respect of tapes entering the province for which no commercial showing is sought. The task of reviewing and classifying each of these would be enormous. The labelling requirements, and the requirements to show in advertising and on customer lists whether or not a tape is of a classified work, seem useful ways of dealing with the inevitable problem of unclassified works. One wonders, however, why the Regulations seem to permit sale or lease of an unclassified video to a person under 18, when at least some of these unclassified tapes may well be on a par with those in the "Restricted" class.

The province of Ontario introduced a video regulation scheme with the 1984 amendment of the *Theatres Act*. The definition of "film exchange" in the *Act* was changed to "the business of distributing film", with "distribute" being defined to include distribute for direct or indirect gain, rent, lease and sell.[56] The Regulation under the *Theatres Act* was changed to introduce the concept of a "film exchange-retail". This is a film exchange that does not distribute film for the purposes of exhibition.[57] Before the changes to the *Act* and Regulations, this type of exchange was totally exempt from the requirements of the *Act* and Regulations. Now, however, the film exchange-retail is required to possess a licence and is subject to certain of the requirements of the *Act*. However, a film exchange-retail is not subject to subsection 35(1) of the amended *Theatres Act*, which provides that before the exhibition or distribution in Ontario of a film, an application for approval to exhibit or distribute and for classification of the film shall be made to the Board.[58]

The film exchange-retail amendments to the regulation having been made in early 1985, we are not in a position to comment on their operation. Obviously, observers will follow with interest the course of this experiment in video regulation, as they will comparable efforts in Nova Scotia and the United Kingdom.

Footnotes

[1] Badgley Report, Vol. II, at 1109 ff.

[2] N. Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and Criminal Control of Obscenity*, W.P.P.P. #16.

[3] Nova Scotia: *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, as amended by S.N.S. 1972, c.54. N.S. Reg. 97/78 as amended by N.S. Reg. 36/81; N.S. Reg. 96/81; N.S. Reg. 130/82; N.S. Reg. 16/83; N.S. Reg 48/83, and Regulations Respecting Film Exchanges, February 21, 1984.

New Brunswick: *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c.T-5, as amended by S.N.B. 1977, c. M-11.1; S.N.B. 1978, c. D-11.2; S.N.B. 1979, c.41; S.N.B. 1979, c.71; S.N.B. 1980, c.32. *General Regulation - Theatres, Cinematographs and Amusements Act* (N.B. Reb. 84-249).

Québec: *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18. *Cinema Act*, S.Q. 1983 assented to June 23, 1983, but not yet proclaimed. There is also a *Regulation Concerning The Bureau de Surveillance du Cinéma* passed under the *Cinema Act*, R.S.Q. 1964, c.55.

Ontario: *Theatres Act*, R.S.O. 1980, c.498, as amended by S.O. 1984, c.56. Regulation 931, R.R.O. 1980, as amended by O. Reg 29/82, O. Reg. 56/85 and O. Reg. 61/85.

Manitoba: *The Amusements Act*, R.S.M. 1970 c. A70 as amended by S.M. 1970, c.96, s.5; S.M. 1972, c.6, s.28-29; S.M. 1972, c.35; S.M. 1972, c.74; S.M. 1974, c.14; S.M. 1974, c.64, s.29; S.M. 1975, c.42, s.2; S.M. 1975, c.63; S.M. 1978, c.49, s.6; S.M. 1979, c.28, s.2. M.R. 49/75, as amended by M.R. 103/76; M.R. 65/78; M.R. 2/79; M.R. 115/80; M.R. 111/82.

Saskatchewan: *The Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11. *The Theatres and Cinematographs Regulations*, O.C. 1873/81.

Alberta: *Amusements Act*, R.S.A. 1980, c.A-41. Alta. Reg. 72/57, as amended by Alta. Reg. 261/82; Alta. Reg. 8/83.

British Columbia: *Motion Picture Act*, R.S.B.C. 1979, c.284, as amended by S.B.C. 1981, c.20, ss.48-9. B.C. Reg. 221/70, as amended by B.C. Reg. 92/79; B.C. Reg. 358/79; B.C. Reg 459/81.

[4] See, for example, the British Columbia *Motion Picture Act*, R.S.B.C. 1979, c.284, s.1; the Alberta *Amusements Act*, R.S.A. 1980, c.A-41, s.1(c); the Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c.T-11, s.2(c); Manitoba *Amusements Act*, R.S.M. 1970, c.A70, as amended, s.2(f); Ontario *Theatres Act*, R.S.O. 1980, c.498, as amended, s.1(d).

[5] In Nova Scotia, the *Regulations Respecting Film Exchanges*, creating a licensing regime for video retailers, were approved by the Lieutenant Governor in Council on February 21, 1984. Amendments to the Ontario *Theatres Act*, effected by S.O. 1984, c.56, opened the way to including video retailers within the Ontario scheme, and Ontario Regulations 56/85 and 61/85 were passed pursuant to the amended legislation.

[6] *The Censoring of Moving Pictures Act*, R.S. Nfld. 1970, c.30.

[7] Badgley Report, Vol. II, at 1109.

[8] *Ibid.*, at 1110.

[9] See Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.2(1)(g); New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.32(g); Ontario *Theatres Act*, s.3(5)(a) as enacted by S.O. 1984, c.56, s.3; Alberta *Amusements Act*, R.S.A. 1980, c.A-41; B.C. *Motion Picture Act*, R.S.B.C. 1979, c.284, s.4(c).

[10] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1.

[11] By S.O. 1984, c.56, s.13.

[12] Section 21(2), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.

[13] Section 21(3), added to Regulation 931 of R.R.O. 1980 by O. Reg 56/85, s.2.

[14] *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors* (1984) 5 D.L.R. (4th) 766 (Ont. C.A.), affirming 147 D.L.R. (3d) 58 (Ont. H.C.-Div. Ct.).

[15] Manitoba *Amusements Act*, s.22(3), as enacted by S.M. 1972, c.74, s.4.

[16] *An Act Respecting the Cinema*, R.S.Q. 1977, c. C-18, s.16 ff. and *Cinema Act*, S.Q. 1983, c-37, s.76 ff.

[17] See s.3(5)(b) of the Ontario *Theatres Act*, as enacted by S.O. 1984, c.56, s.3; Saskatchewan *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s. 7(3)(b).

[18] *Motion Picture Act*, R.S.B.C. 1979, c.284, c.4(b).

[19] Nova Scotia *Theatres and Amusements Act*, R.S.N.S. 1967, c.304, s.17(1).

[20] Alta. Reg. 72/57 as amended, s.18(1).

[21] Badgley Report, Vol. II, at 1115.

[22] New Brunswick *Theatres, Cinematographs and Amusements Act*, R.S.N.B. 1973, c. T-5, s.25(1).

[23] Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and Criminal Control of Obscenity*, W.P.P.P. #16 at 51-54.

[24] Ontario, Ministry of Consumer and Commercial Relations, Theatres Branch Annual Report 1982-1983, at 15, cited in Boyd, *op. cit.* at 48.

[25] Boyd, *op. cit.* at 49.

[26] Amusements Regulation Board, *Classification Parameters*, quoted in Boyd, *op. cit.* at 50.

[27] Boyd, *op. cit.* at 49-50.

[28] *Ibid.*, at 51-52.

[29] Badgley Report, Vol. II, at 1115.

[30] *Amusement Act* P.S.M. 1970 as amended.

[31] Boyd, *op. cit.* at 55.

[32] Badgley Report, Vol. II, at 1115.

[33] Subsections 3(7) and 3(8) enacted by S.O. 1984, c.56, s.3.

[34] R.S.B.C. 1979, c.284, s.8(1).

[35] As enacted by S.M. 1972, c.74, s.4.

[36] Manitoba Regulation 49/75, ss. 2 to 6 inclusive.

[37] R.S.A. 1980, c. A-41, s.23(m)(i).

[38] Alta. Reg. 261/82, s.19.

[39] R.S.S. 1978, c. T-11, s.7(3)(c).

[40] In N.S. Reg. 129/82, s.17(2).

[41] Subsection 25(7) of the *General Regulation - Theatres, Cinematographs and Amusements Act*, 84-249 uses these three categories to refer to trailers, but we could not find a provision specifically applying them to feature films.

[42] Subsection 18(1) of Order in Council 1873/81.

[43] Subsection 18(2) of Order in Council 1873/81.

[44] R.S.N.B. 1973, c. T-5, s.14(1)

[45] Subsection 20(2) of the *Theatres Act*, enacted by S.O. 1984, c.56, s.10.

[46] R.S.B.C. 1979, c.284, s.8(3).

[47] *Theatres and Cinematographs Act*, R.S.S. 1978, c. T-11, s.15(b).

[48] *Motion Picture Act*, R.S.B.C. 1979, c.284, s.8(3).

[49] N.S. Reg. 129/82, s.21(b).

[50] R.S.S. 1978, c. T-11, s.13(1).

[51] R.S.M. 1970, c.A70, s.24(1).

[52] R.S.A. 1980, c. A-41, s.23(n).

[53] (1978), 84 D.L.R. (3d) 1, at 28.

[54] See note 4.

[55] See note 5.

[56] See s.1(ba) added to the *Theatres Act* by S.O. 1984, c.56, s.1(2) and the amendment to s.1(f) enacted by S.O. 1984, c.56, s.1(3).

[57] See O. Reg. 61/85, s.1, adding a new s.1(ca) to s.1 of Regulation 931, R.R.O. 1980.

[58] See the amendment to s.2(3) of Regulation 931, effected by O.Reg. 61/85, s.2.

Chapter 15

Control and Regulation of Pornography by Municipal Law

As has been pointed out in Part I, municipalities in Canada have authority to regulate and control a wide range of activities. They are subject to only three constraints: the *Charter of Rights and Freedoms*; the division of powers within the Canadian Constitution; and the fact that municipalities' powers are assigned to them by provincial legislatures. Municipalities have the power to license and otherwise regulate businesses, and to zone land use within their boundaries. Their powers also extend to control of the highways and other public places within their jurisdiction and to the control of nuisances.

Although municipalities have authority to make by-laws regulating and governing trades, they cannot use this power to make it unlawful to carry out legal business activities.[1] This position was recently confirmed in *City of Prince George* v. *Payne*[2] where the Supreme Court of Canada held that the city of Prince George could not use the power to refuse a business licence to prohibit any "sex shop" from opening there. There is a suggestion in that decision, however, that zoning by-laws could have been used to prevent the location of "sex boutiques" within the city. The city of Vancouver recently took this approach and passed a by-law preventing businesses retailing "sex orientated products" from locating within the city. That by-law has been successfully challenged on the grounds of vagueness but not on the legitimacy of the use of the zoning power to prevent the location of such establishments within Vancouver.[3]

Canadian municipalities have endeavoured, particularly in recent years, to use their powers to enact regulatory and zoning by-laws to control the activities of establishments engaged in what might be described as the "sex trade", in particular, "adult entertainment parlours", and the display of so-called "adult materials". Although some of these by-laws have been struck down, it seems that in every case, that has been the result of a finding that the specific enactment is overly vague or encroaches on the federal power over criminal law. There is nothing in these cases to indicate that a carefully worded by-law, which is clearly regulatory in purpose, will be struck down. Indeed, there is every reason to suggest that it will be upheld.

The designation "adult entertainment parlour" is principally, but not exclusively, a creature of the *Municipal Act*[4] of Ontario in which Section 222 allows municipalities to regulate such establishments. The definition used in that section is very broad and includes premises featuring striptease shows, nude or semi-nude waitresses, sex shops and businesses offering adult materials, including books and magazines, which "appeal to, or are designed to appeal to, erotic or sexual appetites or inclinations".[5]

Some Ontario municipalities regulate adult entertainment parlours through licensing regulations which deal with the type of business they can conduct, hours of business, advertising, etc., and impose heavy licence fees. Some municipalities also use zoning regulations to strictly control where such businesses can locate. For example, the city of North York allows adult entertainment parlours only in industrial areas and at least 500 metres away from residential areas.[6] In a recent decision of the Ontario Provincial Court,[7] a zoning by-law confirming the location of adult entertainment parlours in the city of Oshawa was upheld. Such by-laws are, however, subject to general provisions regarding zoning, for example, the approval of the Municipal Board in Ontario, and the need for a public hearing in British Columbia.

Regulatory by-laws *governing* adult entertainment parlours have been subject to several challenges. They have been challenged on the ground that, in effect, they regulate obscenity, which is a matter for the federal authorities under the criminal law. In *Sharlmark Hotels Ltd.* v. *Metropolitan Toronto*[8] the Ontario Divisional Court upheld Toronto's by-laws dealing with adult entertainment parlours as being regulatory in nature and not trespassing on the criminal law power. More recently, the Toronto "G-String" by-law requiring dancers to have an opaque covering over their pubic area was upheld in *Koumoudouros* v. *Metropolitan Toronto,*[9] and a British Columbia court upheld a by-law which prohibited in licensed establishments "entertainment" involving the use or display of any person whose genitals can be seen.[10]

By contrast in *Nordee Investments Ltd.* v. *The City of Burlington,*[11] a by-law which attempted to regulate nudity in eating establishments, was struck down by the Ontario Court of Appeal.

The court held that the by-law was, in effect, an attempt to prohibit in Burlington any form of activity, including dancing, where any part of the breast or buttock is exposed. It held that the by-law went beyond regulation, was inconsistent with the *Criminal Code* and hence not within the power of the municipality to enact. The court was concerned with the wide scope of the by-law and interpreted it as being applicable even to ballet dancers performing in a theatre where beverages were available during intermission. The Court distinguished the earlier decision in the *Sharlmark Hotels* case on the basis that there the by-law dealt *only* with adult entertainment parlours. In conclusion, the court found that a municipality cannot:

> under the guise of regulating all establishments where food and drink is prepared or made available, enact a standard with regard to nudity that is in conflict with that set out in the *Criminal Code*. Such a by-law, under the pretext of regulating a wide variety of establishments, denies defences available under the *Code* and creates a form of censorship that may vary from community to community.

In summary, genuinely regulatory by-laws with well defined and specific terms are likely to be upheld. However, those like the Burlington by-law which can be read in a broad manner and viewed as an attempt to impose a stricter standard than that imposed by the *Criminal Code*, are unlikely to survive challenge. They will be struck down as, in effect, an attempt to prohibit the activities by a municipal government lacking the power to pass criminal law.

Municipalities have dealt with the matter of the display of "adult material" in various ways. Their major objective appears to be to prevent offensive material being displayed where children may be exposed to it. Several municipalities have had success in this area by asking retailers to voluntarily place such material behind opaque covers at a certain height above the ground, for example, the Ontario municipalities of Guelph and Brockville. Others have resorted to by-laws and enforcement. Municipalities in Québec have been particularly active in this regard, enacting numerous by-laws dealing with the display of erotic objects and literature. Most require magazines and books to be placed over five feet off the ground and displayed behind an opaque screen so that only the title is visible.[12]

Some municipalities have apparently had the problem solved for them by citizens' initiative. In British Columbia, the municipality of Delta found that the problem was solved when parents threatened to impose economic sanctions on stores that openly displayed such materials. Other municipalities across the country have found that when customers systematically deny their custom to businesses that refuse to restrict sexually explicit material, positive results usually follow.

A less orthodox solution was alluded to by the City Clerk of Port Coquitlam in this letter to the Committee of April 26, 1984:

> The one problem that did arise in Port Coquitlam concerned the distribution of what were alleged to be pornographic video tapes and this was quickly solved when an extremist group firebombed the store which shortly thereafter shut its doors.

In Ontario, the City of Hamilton attempted to control the display of adult reading materials by requiring that a seller first obtain a licence under the adult entertainment parlour licensing provisions, and then comply with height and cover regulations concerning their display. The by-law was struck down by the Court of Appeal in *Hamilton Independent Variety & Confectionary Stores v. City of Hamilton*[13] as being vague and, therefore, void for uncertainty. The Court held that the wording "appealing or designed to appeal to erotic or sexual appetites or inclinations" was not adequate to allow a retailer to decide whether he needed a licence or not.

In a more recent decision of the Divisional Court in Ontario,[14] a similar Toronto by-law, which imposed an obligation to obtain a licence if one wished to sell material which:

> (i) portrays or depicts by means of photography or drawing or otherwise, female breasts, any person's pubic, perineal and preanal areas and buttocks, and
>
> (ii) appeals to, or is designed to appeal to, erotic and sexual appetites and inclinations

was also struck down for vagueness. However, the judge felt bound to discuss the constitutionality of the provision and declared the enabling section of the *Municipal Act*[15] beyond the power of the province to enact, so far as it attempted to deal with the distribution of books and magazines. In reaching this decision, the judge referred to the penalties that could be imposed on a seller who failed to obtain a licence and to the fact that the by-law did not regulate all booksellers.

The court's comments with respect to the vagueness of the by-law follow logically from the finding of the Court of Appeal in the *Hamilton* case. Doubts may be raised, however, about the judge's comments on the issue of the power of the province to enact the by-law. It is generally accepted in other authorities that municipalities can regulate businesses by special and more demanding regimes not applicable to businesses generally. What this case seems to be saying is that within a particular category of business, a by-law cannot discriminate between different types of operators. It remains to be seen whether this refinement will receive broader judicial support.

It does appear that in other provinces, municipalities have successfully controlled the display of these items under their general power to regulate businesses, without specific enabling legislation similar to that found in the *Municipal Act* of Ontario. For example, the city of Vancouver recently enacted a by-law which requires the operation of any business, trade or occupation which sells adult publications, to display such material behind an opaque screen 47 inches above the ground.[16]

Despite the element of uncertainty left by the most recent decision in Ontario, municipalities do have the power to regulate the display of pornography, as long as the by-law is sufficiently precise and detailed and the effect of the regulation is not to prohibit the sale or use of the material. The latter objective can, it seems, be achieved by a properly framed zoning by-law. The only question mark relates to whether a by-law which attempts to specially regulate a minority of a larger group of outlets, is within the power of the municipalities.

Although the degree of uncertainty about the powers of municipalities in this regard is limited, the fact that any uncertainty exists has made some municipalities very reluctant to introduce regulations. This reluctance has been accentuated by the considerable cost involved in responding to a challenge of the validity of by-laws in the courts. The Courts have proved to be expensive laboratories for the testing of municipal by-laws.

Footnotes

[1] *City of Toronto* v. *Virgo*, [1896] A.C. 88 (P.C., Canada).

[2] *City of Prince George* v. *Payne* (1977), 2 D.L.R. (3rd) 1 (S.C.C.).

[3] In *Red Hot Video* v. *City of Vancouver* (1984), 5 D.L.R. (4th) 61 (B.C.S.C.) the by-law was upheld, but has recently been struck down by the Court of Appeal on the ground of vagueness in a short interim oral judgment.

[4] *Municipal Act*, R.S.O. 1970, C. 236.

[5] *Ibid.*, s. 222(9).

[6] City of North York, By-Law 27901.

[7] *R.* v. *507638 Ontario Ltd. and 505141 Ontario Ltd.* 1984 unreported (Ont.Prov.Ct.).

[8] *Sharlmark Hotel Ltd.* v. *Metro Toronto* (1981), 121 D.L.R. (3rd) 415 (Ont.Div.Ct.).

[9] *Koumoudouros* v. *Metro Toronto* (1984), 6 D.L.R. (4th) 523 (Ont.Div.Ct.).

[10] *City of Port Alberni* v. *Hotel Barclay Ltd.* 3 Jan. 1984 unreported (B.C. Prov. Ct.).

[11] *Nordee Investments Ltd.* v. *City of Burlington*, July 25, 1984 unreported (Ontario Court of Appeal).

[12] See e.g. City of Hull By-law 1737; City of Lachine By-law 2333; City of Mount Royal By-law 1153; City of Pointe Claire By-law 2228.

[13] *Hamilton Independent Variety & Confectionary Stores* v. *City of Hamilton* (1983), 137 D.L.R. (3rd) 499 (Ont.C.A.).

[14] *Information Retailers Association of Metropolitan Toronto* 15 Oct, 1984 unreported (Ont.Div.Ct.).

[15] Municipal Act, R.S.O. 1970, c.236.

[16] Vancouver by-law 1984.

Section III

Legal and Social Reactions to Pornography in other Countries

Summary

Research was conducted for or by the Committee into the legal approaches and social attitudes to pornography in several countries with social and cultural traditions similar to those of Canada. In the first chapter of this section, we consider the experience of the United States. We then proceed in Chapter 17 to a discussion of three Commonwealth jurisdictions, England and Wales, Australia and New Zealand. In Chapter 18 we move to consideration of the law and social reaction in five continental European countries. The review of the experiences of these countries is not exhaustive, but we think there is sufficient detail to provide some useful information or reactions to pornography elsewhere as a way of examining the possible range of options for Canada.

There are very few international Agreements and Conventions dealing with what are referred to as "obscene" writings and representations. In 1983, the Economic and Social Council of the United Nations passed a resolution which essentially recommended that member states legislate domestically to curb production and trade of pornography, and to impose severe penalties where children are involved. A description of these international initiatives and Canada's record of adherence to them is discussed in Chapter 44 of Part IV.

Chapter 16

The United States

The United States, like Canada, is a federal state. However, unlike Canada, jurisdiction over criminal law in the United States rests with the state governments. Each of the 50 states is therefore free to enact its own set of criminal prohibitions to deal with pornography.

There are, however, several federal enactments dealing with such matters as sending pornographic material through the mails, importing pornography and transporting pornography across interstate boundaries. They are prohibitory in nature. Operating along side this legislation is a large body of regulatory legislation that controls pornography through means other than the threat of criminal sanction. Most of this legislation has been passed by municipalities.

Despite the fact that there is a tremendous amount of legislation in the United States aimed at it, pornography is freely available in that country. The major reason for this apparent inconsistency arises because of the interpretation that has been given to the guarantee of "freedom of speech" in the First Amendment to the American Constitution. The Supreme Court of the United States has decided that most of what can be called pornography is protected by the First Amendment. In fact, it is only the really "hard-core" pornographic material that satisfies the stringent test of obscenity set down by the court in the 1973 case of *Miller* v. *California*[1] that is denied that protection. The test asks:

(a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;

(b) whether the work depicts or describes sexual conduct in a particularly offensive manner; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

All three of these questions need to be answered in the affirmative for the material to lose the protection of the First Amendment.

The *Miller* decision also held that there is no need to fix the "community" whose standards are to be applied as the *national* community. States are, therefore, free to select a more limited community if they wish. At the same time, the Supreme Court has made it clear that the "average person" who applies those standards is the average *adult* person, not the average child.[2]

The upshot of this landmark decision has been that much of what is commonly considered pornographic is protected from regulation by both the state and federal governments. The protection from regulation is not, however, absolute. The need to regulate must be shown to be "compelling". On this basis, the Supreme Court has upheld both a municipal ordinance restricting the areas in which theatres showing "adult" movies could locate[3] and state legislation prohibiting the sale of certain books and magazines to children.[4] And, in a recent case, *New York* v. *Ferber*[5], the Supreme Court upheld state legislation prohibiting the dissemination of material which showed children engaged in sexual conduct. In the Court's view, child pornography was a distinct category of speech that, like obscene speech, was beyond the reach of the protection afforded by the First Amendment.

It is still possible, therefore, for the state and federal governments in the United States to legislate against pornographic material that does not meet the *Miller* test. By and large, however, state governments have preferred not to legislate against such material except for special provisions designed to protect children. In fact, over 40 states have expressly incorporated the *Miller* test into their criminal codes, although the language used in the legislation is not always identical. The kinds of sexual conduct referred to in the second branch of the test as well as the size of the community whose standards are to be used, can vary from state to state. Despite these differences, there is a high degree of uniformity in the legislation enacted by the various states.

The *Miller* test has also been used in many of the state and municipal enactments that take a public nuisance approach to the control of pornography. These enactments are based on the principle that activities that are injurious to the public health, safety or morals amount to a public nuisance and are subject to abatement by prohibitory injunction. Obscene materials are declared to constitute a public nuisance and provision is made for the bringing of civil actions to prevent stores from continuing to sell such materials.[6]

Legislation at the federal level in the United States seldom incorporates the *Miller* test. The prohibitions contained in this legislation tend to be formulated in terms of words like "obscene", "profane", "lewd", "lascivious", "filthy", "indecent" or some combination thereof, with no definitions being given for them. Into this category fall the prohibitions against sending offensive matter through the mails,[7] sending or transporting such matter in interstate commerce,[8] using offensive language on the radio[9] and importing offensive matter into the country.[10]

Federal legislation dealing with child pornography also fails to incorporate the *Miller* test. The prohibition here is directed against "visual depictions" of "sexually explicit conduct" involving children, with no reference at all to any qualitative standard.[11] In fact, the only federal legislation that does incorporate the *Miller* test of obscenity appears to be a bill not yet enacted that deals with the use of obscene language and images on radio, television and cable television.[12]

The absence of express reference in federal legislation to the language of the *Miller* test does not appear to have rendered that legislation unconstitutional.[13] Indeed, the courts appear to have been willing to read the test into the legislation. As a result, the *Miller* test does affect federal legislation. The only exception is legislation directed at child pornography, which, as we saw earlier in the discussion of the *Ferber* case, is a distinct category of unprotected speech for First Amendment purposes.

The First Amendment is not the only source of constraints on legislative power in the area of pornography. The right of privacy (which the United States Supreme Court has said can be implied from the American *Bill of Rights*) has been held to be a bar to making the mere possession of obscene material a crime.[14] This has not been a significant constraint on legislative power, however. The Supreme Court has decided that the right of privacy cannot be used to prevent governments from prohibiting the various ways in which people might attempt to take obscene material into their private possession. Hence, the Supreme Court has upheld as valid legislation prohibiting the carriage of obscene material in one's luggage on an airplane,[15] as well as legislation prohibiting the receipt of obscene materials through the mails.[16]

Enforcement of the laws against pornography has proven difficult in the United States. One of the major reasons has been that it is not very clear what material is caught by the variety of laws. Another problem has been the tremendous volume of material in circulation in the country. Still another has been a shortage of regulatory and enforcement personnel. As a result of these problems, enforcement efforts have been concentrated in the areas of child pornography and the involvement in the pornography industry of organized crime. Little tends to be done about adult pornography. In some cities, like New York, the police will act only if a complaint from the public is received.

One of the interesting discoveries made by the Committee's researchers is that, in spite of the enforcement problems just alluded to, the City of Cincinnati in Ohio claims to have done away with pornography. There the "battle against pornography" has been waged, it appears, not by criminal prosecutions but by civil actions. The actions are based on the kind of public nuisance statutes mentioned earlier. The successful actions have resulted in pornography outlets simply being closed down.

To our knowledge there is no govermental involvement in the United States in the censorship and classification of films for public viewing. The classification of films is performed by a body established by the film industry itself. The major reason for the lack of governmental involvement in this area is, once again, the First Amendment and the fact that the United States Supreme Court has shown little sympathy for "prior restraints" on speech.

Needless to say, existing legislation and enforcement techniques and priorities are seen as unsatisfactory by some Americans. Much opposition has been voiced by some conservatives, who, through organizations established for the purpose, are active lobbyists at both levels of government for tighter control over pornography. Feminists, too, are campaigning for a tougher approach in this area. Two of the leading feminists, Catharine MacKinnon and Andrea Dworkin, have proposed a "human rights approach" to deal with pornography. The details of this approach are discussed in a later chapter of this report, but the basic theme is that pornography is seen as a form of discrimination against women. Women are, therefore, given the right to claim damages to compensate them for the harm such discrimination causes. Thus far, however, the only city to enact this approach by city ordinance has had the legislation struck down as being in violation of the First Amendment.[17]

Footnotes

[1] 413 U.S. 15 (1973).

[2] *Pinkus* v. *U.S.* 436 U.S. 293 (1978).

[3] *Young* v. *American Mini Theatres Inc.* 427 U.S. 50 (1976).

[4] *Ginzburg* v. *U.S.* 390 U.S. 629 (1968).

[5] 458 U.S. 1113 (1982).

[6] These enactments are discussed by Judge Borins in his recent decision in *R* v. *Nicols* (27 Nov. 1984, unreported (Ont. Co. Ct.).

[7] 18 U.S.C., s. 1461 and 18 U.S.C., s. 1463.

[8] 18 U.S.C., s. 1462 and 18 U.S.C., s. 1465.

[9] 18 U.S.C., s. 1464.

[10] 19 U.S.C., s. 1305.

[11] *The Child Protection Act*, 18 U.S.C., ss. 2251-2255.

[12] The statute, called the *Cable-Porn and Dial-Porn Control Act*, would amend 18 U.S.C., s. 1464.

[13] See, for example, *Hamling* v. *U.S.* 418 U.S. 87 (1974) and *U.S.* v. *Reidel* 402 U.S. 351 (1971).

[14] *Stanley* v. *Georgia* 394 U.S. 557 (1969).

[15] *U.S.* v. *Orito* 413 U.S. 139 (1973).

[16] *U.S.* v. *Reidel*, *supra*, note 13.

[17] *American Booksellers Assoc. Inc.* v. *Mayor of the City of Indianapolis* No.1P84-791C (Dist. Indiana Nov. 19, 1984).

Chapter 17

Commonwealth Countries

1. England and Wales

The subject of pornography is dealt with in England and Wales in a variety of different statutes. The trend in recent years has been towards greater state involvement.

The major piece of British legislation is the *Obscene Publications Act 1959.*[1] The *Act* was prompted in part by the fact that the common law offence of obscene libel was being used against what many Britons thought was "serious literature". The *Act* replaced the common law test of "obscenity" developed by Chief Justice Cockburn in 1868 in *R. v. Hicklin.*[2] It will be recalled that that test was "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". The new statutory test was whether the effect of the material in question is, "if taken as a whole, such as to tend to deprave and corrupt those who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it".[3]

There are two major differences between these two tests. One is that the *Hicklin* test isolated the allegedly obscene parts of a work and examined them without reference to the whole, while the statutory test requires that any part must be viewed in the context of the entire work. In addition, under the *Hicklin* test, the measuring stick was the effect the material might have on the most vulnerable people within society, regardless of whether they would actually come into possession of the material. The statutory test is specifically directed to those people who are likely to encounter the material.

The *Obscene Publications Act 1959* also added, in section 4, the defence of "public good", giving the accused an opportunity to show that the material was "in the interests of science, literature, art or learning, or of other objects of general concern". The *Act* expressly provides that expert evidence is admissible to establish the defence.

The offences created by the *Obscene Publications Act 1959* are (1) publishing, whether for gain or not, an obscene article; and (2) having an obscene article for publication or gain. The term "publish" is defined to include all forms of distribution, including giving and lending, and offering to sell or rent. The word "article" is defined to include written and pictorial material, sound recordings, objects and films.[4]

An important feature of the 1959 *Act* is the forfeiture provision, section 3. That provision is virtually identical to section 160 of our *Criminal Code*. It authorizes the issuance of warrants entitling peace officers to seize material believed to be obscene. The material is then the subject of a further hearing where the Crown seeks to establish that the material is obscene. A finding that it is obscene does not result in the owner or person in possession of it being convicted. Rather, as in the case of our section 160, the material is simply forfeited to the Crown.

The provisions of section 3 were criticized in the 1979 report by the Williams Committee on Obscenity and Film Censorship for the absence of any provision giving the right to have the show cause hearing held before a jury. This omission was seen to be particularly important because experience had shown that in prosecutions under section 2 of the *Act*, in which the accused can elect to go before a jury, juries had been less willing to convict than judges.[5] The Williams Committee also expressed concern about the fact that section 3 allows the state to detain goods for a period of time without the goods having been found to be obscene.[6]

Although the test of obscenity focuses on whether the material has a tendency to deprave and corrupt those people who are likely to encounter it, experience has shown that the focus in cases arising under the *Act* has often been on whether or not the material offends general community standards of what is acceptable. The presumption appears to have been made that, if the material does offend these standards, it will have the necessary damaging effects on those who read or view it.[7]

It would seem, therefore, that, in much the same way as the test of obscenity in our own section 159(8) has been rewritten by our courts to introduce the element of community standards, the test in the 1959 *Act* has likewise been rewritten by the courts in England.

The "public good" defence has been a matter of considerable controversy in England. While there is much sympathy for the view that works of real literary or artistic merit should not be caught by the *Act*, difficulty has been found with the notion that a work that can deprave and corrupt some people can also be for the good of others or the public generally. Problems have also arisen in the application of the defence. Its open-ended nature has resulted in some cases in experts being called to testify as to the therapeutic value of reading or seeing pornography (although the House of Lords eventually ruled such evidence to be improper).[8] There have also been suggestions that the "public good" element is to be considered alongside the obscenity element in deciding whether the material in question meets or exceeds the community standards of acceptability.

The importation of pornographic material is governed by Customs legislation.[9] This legislation prohibits the importation of material that is "indecent or obscene". This term has been taken to impose a higher standard than that imposed by the *Obscene Publications Act 1959*, with the result that material that cannot be imported may nevertheless be produced and distributed domestically In this regard, it is also to be noted that the Customs legislation makes no provision for a public good defence.

This same "indecent or obscene" test is used in postal legislation to prohibit the use of the mails to distribute pornographic material.[10] It appears, however, that this prohibition is very seldom enforced in respect of domestic mail because of the difficulty of discovering the contents of letters and packages. Mail coming in from outside the country is, of course, subject to Customs regulations which provide that mail can be opened for examination by Customs officials.

Obscene performances of plays were brought under statutory control by the *Theatres Act 1968*.[11] That law prohibits, with a few exceptions, the giving of an obscene performance of a play, whether in public or private and whether for gain or not. The prohibition is limited to those who direct or otherwise control or produce the performance; performers themselves are not covered. The same test of obscenity is used here as is used in the *Obscene Publications Act 1959* and the legislation provides for a "public good" defence. It would appear that the Act is used very seldom.

Special legislation concerning children was enacted in 1978.[12] This legislation is designed to prevent persons taking and distributing "indecent" photographs of children under 16. On a charge of distributing such photographs, the accused is entitled to be acquitted if he can show he had a "legitimate reason" for distributing them or that he did not know, and had no cause to suspect, that they were "indecent". The term "indecent" is nowhere defined in the *Act*. It would appear, however, that it imports a lower standard than the term "obscene" as that term is defined in the *Obscene Publications Act 1959*.

Prior to 1981, indecent public displays were governed by the *Vagrancy Acts* of 1824 and 1834.[13] These enactments prohibited the public display of any obscene print, picture or "other indecent exhibition". In 1981 the British Parliament enacted the *Indecent Displays (Control) Act 1981*[14] which created the new offence of displaying "indecent matter ... in or so as to be visible from any public place". The term "public place" is defined to exclude both places that charge an entrance fee for the purpose of viewing the display and shops that have an "adequate warning" about what they have on display. It is made clear that neither of the exclusions will apply if persons under 18 are permitted entry. Again the term "indecent" is left undefined. It is provided, however, that in determining whether any displayed matter is indecent, "account shall be taken of the effect of juxtaposing one thing with another."

In 1982 an amendment to the *Local Government (Miscellaneous Provisions) Act 1982*[15] gave to local governments broad powers over so-called "sex establishments". One of the powers given to such governments is the power to exclude such businesses entirely from certain areas and districts. The City of Westminster, which had applied considerable pressure on the British Parliament to introduce this legislation, has used its new powers to exclude sex establishments from a large number of areas within London and to set a maximum for the number of licences it will grant in the few areas that remained. The majority of these licences were ultimately allocated to Soho.

The public showing of films is government regulated by a system of licensing *cinemas* rather than a system of censorship or classifying particular *films*.[16] Licences to operate cinemas are issued by local governments which impose as conditions on those licences a number of limitations on the kinds of films that can be shown. These conditions can vary from place to place, although a significant number of local governments adopt the list of "model conditions" prepared by the British Home Office.

Failure to observe these conditions, either by showing movies that are deemed unsuitable or by showing them to children when they are only suitable for adults, puts the licence at risk. The local government has the authority to determine what is and what is not suitable for viewing by the public or by a particular segment of the public. Many local governments, however, simply defer to the directions and classifications made by the British Board of Film Censors, a non-governmental body formed by members of the film trade.

The most recent legislative enactment in England and Wales is the new *Video Recordings Act 1984*[17] which has instituted a regime of very tight controls over the sale and rental of video recordings. The statute was prompted by concern about the easy access children had to the sexually explicit and violent videos available in video stores. The *Act* requires that, with a couple of minor exceptions, all videos be reviewed and classified or, if necessary, banned prior to distribution to the public. Heavy fines can be imposed on those who fail to have their videos reviewed, as well as on those who defy the rulings of the authority charged with the responsibility of doing the reviewing. That authority, it is interesting to note, will be the British Board of Film Censors.

Pressure for tougher laws on pornography in Britain has come in large part from conservative moralists, and in particular the redoubtable Mrs. Mary Whitehouse and her National Viewers and Listeners Association (NVALA). Their campaign has been assisted by the support of such establishment figures as Lord Longford, the author of a 1972 report on pornography. The women's movement, which the report of the Williams Committee described as basically uninterested in the issue of obscenity during the late 1970's, has begun to show its concern more recently. Undoubtedly influenced by feminist opinion in the United States, concerned British women have engaged increasingly in political campaigning against pornography. Some have even taken to direct action by defacing "sexual establishments", "sitting in" at the offices of the "gutter press" and participating in solidarity marches.

2. Australia

Australia is a federal state where the legislative jurisdiction with respect to pornography is divided between the central Parliament and the six state legislatures. The state legislatures have the power to enact criminal law and to regulate intrastate commerce. The majority of the legislation in the area of pornography is, therefore, to be found at the state level.

As will be seen, Australia has adopted a markedly different approach to the control of pornography than that adopted in Canada. They have opted for a legal regime based on pro-active censorship rather than on reactive punishment.

The importation of pornographic material is controlled at the federal level. *The Customs Act 1901*[18] empowers the Governor General to prohibit the importation of goods into Australia by regulation. Two sets of regulations have been enacted pursuant to this power, the *Customs (Prohibited Imports) Regulations*[19] and the *Customs (Cinematograph Films) Regulations*.[20] The former set of regulations is directed primarily at books and magazines while the latter is directed at films.

Until recently, the *Customs (Prohibited Imports) Regulations* prohibited material that was "indecent" or "obscene", "unduly emphasized matters of sex" or was "likely to encourage depravity". These terms tended to be read together and were taken to impose a "community standards of decency" test. This test was applied strictly by the courts, with the result that, in one case, Gore Vidal's book *Myra Breckenridge* was banned.[21] In 1973, shortly after this case, the Department of Customs and Excise issued a memorandum to its field officers advising them that a new policy was to be adopted with respect to pornographic material. That policy was, in effect, to relax controls and to concentrate on prohibited goods other than pornography. The change in policy was said to have been based on the view that the state should interfere as little as possible in what adults in Australia read or viewed.

In 1984, following a study of the role of Customs in the state of New South Wales,[22] the *Customs (Prohibited Goods) Regulations* were amended to bring them more into line with the Department's new policy. In place of terms like "indecent" and "obscene" are found references to child pornography, bestiality and violence (including sexual violence). These prohibitions are directed at pictorial depictions only and, in the case of the first two, apply only where the depictions are "likely to cause offence to a reasonable adult person".

The importation of films is controlled by the *Customs (Cinematograph Films) Regulations*. These regulations have undergone considerable change over the years but the basic structure appears to have remained intact. That structure calls for films coming into Australia to be viewed by the Commonwealth Film Censorship Board prior to being released to the importer. That body has the power both to ban films and to classify them. As of 1983, the regulations required the Board to ban films that were "indecent or obscene", films that were "likely to be injurious to morality or to encourage or incite to crime" and films that "depict any matter, the exhibition of which is undesirable in the public interest". It would appear that, as in the case of printed material, far less has been kept out of the country than the rather restrictive language of the regulations would suggest should have been. The policy in this area is said to be under review.

As might be expected, state legislation varies from state to state. There are, however, a number of common features to the regimes the states have established to deal with pornography. The most significant of these, and the most interesting from a comparative point of view, is the classification and censorship of *all* pornographic material that is designed for public distribution. Representative of the kind of scheme the states have established is that in place in New South Wales. *The Indecent Articles and Classified Publications Act, 1975*[23] (N.S.W.) calls for the appointment of "classification officers" and for the establishment of a Publications Classification Board. The classification officers are public servants but the members of the Publications Classification Board are appointed from the public. The *Act* stipulates that the Board must include at least one man and one woman as well as one lawyer and one expert in literature, art, medicine or science. As few as five and as many as seven persons can sit on the Board at any one time.

Review of a particular publication can be initiated either by the Minister responsible for the *Act* or by any person involved in the publication's distribution. The publication is first examined by a classification officer. An appeal can be taken from the decision of the classification officer to the Board.

The decisions open to the classification officer and the Board are (1) to authorize the unrestricted distribution of the publication; (2) to restrict the distribution of the publication to persons 18 or over; (3) to restrict the distribution of the publication to under-the-counter sales to persons 18 or over who make an unsolicited personal request for it; and (4) to ban the distribution of the publication.

The only material which is subject to a total ban is child pornography, which is defined as material which depicts a child engaged in an activity of a sexual nature or in the presence of another person who is so engaged. The definition of "child" covers persons under 16, persons who appear to be under 16 and persons represented to be under 16.

In determining whether or not to restrict the distribution of a particular publication, the classification officers and the Board are required to consider "the manner in which and the extent to which, the publication relates to or depicts matters of sex, drug addiction, horror, crime, cruelty or violence".

The rulings of both the classification officers and the Board are published in the official Gazette. Publication in the Gazette is considered to put everyone in the state on notice as to the manner in which a particular publication is to be distributed or, in the case of child pornography, that no distribution is permitted.

Publications subject to restricted distribution can be sold only if they are completely wrapped in opaque wrapping and if they are marked either "R" (which applies to the first restricted category) or "Direct Sale" (which applies to the second restricted category). There are further restrictions on the display and advertising of such publications.

In order to provide sanctions to the regulatory regime, provision is made for various offences. These include distributing material otherwise than in accordance with the decision of the classification officer or the Board, as the case may be, and distributing "indecent" material that has not been classified. The term "indecent", which is not defined in the *Act*, has been interpreted to mean inconsistent with the contemporary standards of decency of the ordinary Australian.[24] Literary, artistic, medical or scientific value is a factor in the determination of whether something is "indecent", and evidence can be called on this question.

Not all of the state schemes in this area operate in precisely the same way as the New South Wales scheme operates. In Queensland, for example, the tribunal established by the legislation has no power to classify; material is either banned altogether or permitted. In Western Australia, the tribunal has advisory powers only; the power to restrict or ban resides with a Minister of the Crown. In South Australia, the tribunal is required to "have due regard to the views of the Minister". In spite of these and other differences, however, it is apparent that the practice of government controlled censorship of pornographic material has taken firm hold in Australia.

Another interesting feature of the control of pornography in Australia is the extent to which governments there have attempted to co-operate with each other. Some state censoring bodies are expressly encouraged in the legislation creating them to rely on the decisions of other state or national censoring bodies. In the area of film censorship this co-operation has extended to the point of state governments delegating their power to the Commonwealth Film Censorship Board.

In recent years, much effort has been expended in an attempt to establish a uniform scheme for the censorship and classification of both films and videos. Agreement on the scheme, which would have resulted in very little being banned, appeared to have been reached in early 1984. Eventually, Queensland, probably the most conservative of the states, opted to go its own way.

One of the products of the co-operation between governments in this area has been the enactment in the Australian Capital Territory of the *Classification of Publications Ordinance 1984*.[25] This legislation was intended to be the model for the state governments, particularly insofar as the control of videos was concerned. It applies to locally produced as well as imported material that is sold, rented or displayed in the Australian Capital Territory. It provides for compulsory review of such material with appropriate classification markings for consumer guidance. The emphasis is on protecting children and persons who are liable to be offended by material that has been thrust upon them.

Under the scheme, which bears a close resemblance to that in place in New South Wales, printed matter is subject to one of four classifications, including "unrestricted" and "banned".

Films and videos are subject to one of five classifications, one of which is "X" for "hard-core" content.

Child pornography and material that incites to terrorism is banned. Other material that is to be banned deals with matters of sex, drugs, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that offends against the standards of morality, decency and propriety generally accepted by reasonable adult persons.

Whether or not this "model legislation" will be adopted by the state legislatures remains to be seen. The Queensland government has already indicated that it will not adopt it, and has moved to introduce a more restrictive scheme to deal with videos. It is apparent that in Australia as in most countries, consensus on what to do about pornography is difficult to achieve.

3. New Zealand

Pornography in New Zealand is controlled by the operation of four statutes, the *Indecent Publications Act 1963*,[26] the *Customs Act 1966*,[27] the *Films Act 1983*[28] and the *Crimes Act 1961*.[29]

The most important of these appears to be the *Indecent Publications Act 1963*, which governs the production and distribution within New Zealand of "indecent" printed material and sound recordings.

At the time it was introduced, the *Indecent Publications Act 1963* represented a significant break with the past in the control of pornography in New Zealand. The statute it replaced, the *Indecent Publications Act 1910*,[30] had been prohibitory in thrust, with jurisdiction over the offences it created residing in the ordinary courts. The 1963 *Act* rejected that approach in favour of a more regulatory approach, with jurisdiction being transferred to an administrative tribunal.

The functions of that tribunal, which is called the Indecent Publications Tribunal, are defined in section 10 of the *Act* as follows:

(a) to determine the character of any book or sound recording submitted to it for classification;

(b) to classify books and sound recordings submitted to it as indecent, or not indecent in the hands or persons below a specified age, or indecent unless circulation is restricted;

(c) to hear and determine any question relating to the character of a book or sound recording referred to it by a court in any civil or criminal proceedings, and to report its finding to the Court.

The jurisdiction of the Indecent Publications Tribunal can be invoked as of right by government officials such as the Comptroller of Customs and the Secretary of Justice, and by any other persons with leave. Interestingly, the courts are required to refer to the Tribunal any question of "indecency" that might arise before them under other legislation in a criminal or civil proceeding.

The term "indecent" is defined in the interpretation section of the *Act* to mean "dealing with sex, horror, crime, cruelty or violence in a manner which is injurious to the public good". Section 11 lists six different factors that the Tribunal is to take into account in deciding whether or not a particular book or sound recording is indecent. These factors are:

(a) the dominant effect of the book or sound recording as a whole;
(b) the literary or artistic merit, or the medical, legal, political, social or scientific character or importance of the book or recording;
(c) the class and age of persons to, or amongst whom, the publication will be distributed;
(d) the price at which the book or sound recording is sold;
(e) whether any person is likely to be corrupted by reading the book or hearing the sound recording and whether any other person could benefit from such activities;
(f) whether the item displays an honest purpose, or whether its content is merely camouflage designed to render acceptable indecent parts of the material.

Over the years the Tribunal has generated a considerable body of case law, thereby providing guidance as to the standards the Tribunal has applied and will apply.

Those standards appear, when compared with those applied in North American courts, to be quite conservative. The Tribunal has repeatedly distinguished between "serious literary works" and "the mass of cheap cynically commercialized periodical and paperback pornography". Many of the magazines that are considered standard fare in a North American newsstand have been ruled "indecent". The *Act* recognizes, however, that standards can change over time. As a result, material that has been ruled "indecent" can be referred back to the Tribunal for reconsideration after three years have elapsed. There is, therefore, an element of what has been called "community standards" in the decision-making process.

The *Act* contains two offence-creating provisions. Section 21 lists several offences, including such acts as selling, possessing for the purposes of sale, producing and exhibiting for gain an "indecent" book or sound recording, where it is no defence that the accused had no knowledge or reasonable cause to believe that the matter was of an indecent nature. Section 22 lists a number of offences where the Crown must prove that the accused had knowledge or reasonable cause to believe that the matter in question was indecent. It is then for the defence to prove that the act of the accused "had no immoral or mischievous tendency". The acts caught by this section include those covered by section 21 and public displays of indecent matter. Jurisdiction over all these offences remains with the ordinary courts.

The Indecent Publications Tribunal appears to have become an accepted component of the government's attempt to control pornography in New Zealand. It has been said that the appointment of the Rt. Hon. Sir Kenneth Gresson, a distinguished lawyer and former First President of the New Zealand Court of Appeal, as the first chairman, was instrumental in giving the Tribunal a degree of instant legitimacy.

The Tribunal has, however, received criticism from some quarters. A "moral majority" group, the Society for the Promotion of Community Standards, has virulently attacked many of the Tribunal's more liberal classifications. Some observers have suggested that many decisions betray the Tribunal's "bourgeois", liberal origins.[31] Works of literary merit by authors of critical standing have been kept free from governmental interference, while sexual materials "without artistic merit" have been ruled indecent. Some suggest that this has created a different standard of indecency for the non-professional, non-academic, semi-literate classes, presumably on the assumption that their rational powers are weaker and that a consequently greater tendency to corrupt them is present. Geoffrey Robertson, in his book *Obscenity*,[32] attacked the absence of the right to appeal to a jury and the political nature of appointments to the Tribunal. There has been some criticism to the same effect from within New Zealand.

Importation of pornography is controlled by section 48(1) of the *Customs Act 1966*,[33] which refers to "all documents within the meaning of the *Indecent Publications Act 1963* that are indecent within the meaning of that *Act*, and all other indecent or obscene articles". The question of whether a particular document is "indecent within the meaning of that *Act*" is ultimately for the Indecent Publications Tribunal to decide. Its jurisdiction in this regard can be invoked either by the Comptroller of Customs or on a reference from the courts following notice of objection to a seizure from the importer. Persons convicted under section 48(1) are liable to a fine of up to three times the market value of the goods to which the offence relates.

The *Films Act 1983*[34] governs film censorship in New Zealand. All films, save scientific and sports films, that are intended for public exhibition must be presented for examination to the Chief Censor's office. Section 15 of the *Act* empowers the Chief Censor to approve a film for general exhibition to the public or for restricted exhibition to certain classes of persons or on specified occasions. The Chief Censor can order the "cutting" of films and authorize the re-examination of a previously uncut unapproved film.

Films are to be refused a certificate of approval if they are "likely to be injurious to the public good". Section 13 of the *Act* outlines the factors to be considered by the censor to determine whether a film contravenes this standard. These factors resemble very closely those set out in section 11 of the *Indecent Publications Act, 1963*.

There are two features of this statute which deserve special mention. One is the power it grants to the Minister of Internal Affairs to withdraw a film from public exhibition after approval by the Chief Censor if the film is creating widespread concern or is apparently injurious to the general public or any class of the general public. The other is its establishment of a Film Trade Board to act as a watch dog over the film industry. Members of the Board are appointed from various consumer and industry interests. The primary role of this body is to establish and maintain high standards in the industry and in service to the public.

Control of pornographic material not caught by either the *Indecent Publications Act 1963* or the *Films Act 1983* is achieved through the *Crimes Act 1961*.[35] Section 124 of that *Act* creates three distinct offences, one relating to indecent models or objects and two relating to indecent shows or performances. The former cannot be sold or otherwise distributed to the public while the latter cannot be either presented to the public or presented for gain. It is a defence under section 124 to show that the public good was served.

The term "indecent" is not defined in the *Crimes Act 1961*. Until fairly recently, the *Hicklin* test appeared to be the preferred approach to applying this term. But, in 1973, the New Zealand Court of Appeal opted for what it called a "plain meaning approach".[36] The court did not define precisely what test this approach entails. However, the decision suggests that the court was of the view that the test should be comparatively restrictive.

Footnotes

[1] 7 & 8 Eliz. 2, c. 66, (1959).

[2] (1868), L.R. 3 Q.B. 360.

[3] *Obscene Publications Act*, 7 & 8 Eliz. 2, c.66 (1959) s.1(1).

[4] *Ibid.*, s. 1(2).

[5] Williams Report

[6] *Ibid.*, at 14-15.

[7] *Ibid.*, at 11.

[8] *D.P.P.* v. *Jordan*, [1976] 3 All E.R. 775 (H.L.).

[9] *Customs Consolidation Act*, 39-40 Vict., c. 35, (1876).

[10] *Post Office Act*, 1 & 2 Eliz. 2, c.36 (1953).

[11] 1968, c.54.

[12] *Protection of Children Act*, 1978, c. 37.

[13] 3 G. 4, c. 40 and 5 G. 4., c. 83.

[14] 1981, c. 42.

[15] 1982, c. 30.

[16] See the discussion of this in the Williams Report, at 22-34.

[17] 1984 (U.K.)

[18] 1901, No. 6. (Aust.).

[19] 1956, No. 90 (Aust. S.R.).

[20] 1956, No. 94 (Aust. S.R.).

[21] *Altman* v. *Forbes* (1970), 91 W.N. (N.S.W.) 84 (Dist. Ct.).

[22] F.J. Mahony, *Review of Customs Administration and Procedure in New South Wales* (1983).

[23] 1975, No. 32 (N.S.W.) See also the *Objectionable Literature Act 1954*, No. 2 (Qsld); the *Classification of Publications Act 1974*, No. 23 (S. Aust.); the *Police Offences (Offensive Publications) Act 1973*, No. 8443 (Vict); and the *Indecent Publications Amendment Act 1974*, No. 39, (W. Aust).

[24] *Crowe* v. *Graham* (1968), 41 A.L.J.R. 402 (N.S.W. C.A.).

[25] 1984, (A.C.T. Ord.).

[26] 1963, No. 22, (N.Z.).

[27] 1966, No. 19, (N.Z.).

[28] 1983, No. 130, (N.Z.).

[29] 1961, No. 43, (N.Z.).

[30] 1910, No. 19, (N.Z.).

[31] See, for example, S. Levine, "The Indecent Publications Tribunal - Some Political Observations" (1974) 3 *Otago Law Rev.* 228.

[32] (London: Weidenfelt and Nicholson, 1979.)

[33] 1966, No. 19, (N.Z.).

[34] 1983, No. 130, (N.Z.).

[35] 1961, No. 43, (N.Z.).

[36] *R. v. Dunn*, [1973] 2 N.Z.L.R. 481 (N.Z.C.A.).

Chapter 18

Continental European Countries

1. Introduction

The research on pornography in western Europe concentrated on the experience of five countries: France, West Germany, Denmark, The Netherlands and Sweden. Considerable formal variation exists amongst the various methods of control used in the five countries. These range from fairly extensive criminal law and censorship provisions in France, [illegible] an almost of total absence of legal restraint in Denmark. But, even while some of the countries of Continental Europe appear to have a restrictive legal regime, enforcement is often lax. Therefore, in order to capture an accurate impression of the current view of pornography in the countries of continental Europe, it is necessary to examine not only the law but how it is enforced.[1]

2. France

In France, with a highly centralized system of government, control of pornography is achieved through an interlocking system of criminal law and regulatory regimes. On its face, the French legislation appears to be quite restrictive. In practice, however, it appears that the state is prepared to leave considerable room to individual choice.

The major criminal provision in the area of pornography is section 283 of the *Penal Code*. This provision had its origin in the original *Penal Code* of 1810, and embodies the test "outrageous to public morals". It covers not only a broad range of acts (including manufacturing or possessing for sale, distribution, lease, display or exposition, importing or exporting, exposing to public view, selling and distributing) but also a broad range of material (including films, printed matter, sound recordings and photographs).

The term "outrageous to public morals" has been held to be wider in scope than "obscene". In fact, the Supreme Court has held that, in principle, anything which excites sexual feelings *can* be considered to be "outrageous to public morals". However, the Supreme Court has made it clear that not everything that excites sexual feelings will be so considered.

The test currently applied is whether the material contravenes "generally accepted standards of decency in such a way as to provoke the indignation and condemnation of the public". In determining what these standards are, courts are to take into account "all manifestations of the public's opinion, and particularly the opinions expressed by groups of concerned citizens".

Some sense of what French courts consider the reach of the section to be is provided by two decisions involving adult "sex shops". In each it was held that no offence had been committed. In the first (decided in 1972) the Besançon Court of Appeal took into account such factors as the denial of access to minors, the lack of public display of merchandise and a statement by the government that such establishments were not in breach of the section. A similar approach was taken by the Court of Appeal of Reims in 1977. The court noted that "the existence of such businesses is now accepted by the public at large".

Two special procedural rules in relation to section 283 prosecutions should be noted. The first is that, before he can commence a prosecution in respect of a book that prints the names of both the author and the publisher, the prosecutor must consult with a special committee made up of representatives from the Association of Writers and the National Union of Associations for Family Affairs. That committee's opinions are not, however, binding. The second special rule permits the Association of Writers to seek review of a book 20 years after a finding has been made that it contravenes section 283. It appears that some of Baudelaire's works have profited from this rule.

Section 280 of the *Penal Code* prohibits all acts in public that "outrage the norms of decency". The meaning of this term remains somewhat unclear. There is some support in court decisions for the view that this section proscribes live performances in which sexual parts are exposed or obscene gestures are made. At the same time, there seems to be a high degree of tolerance on the part of prosecutorial authorities for at least some such performances.

Only two other general *Code* provisions deserve mention. One proscribes both public oral presentations that outrage good morals and the public advertisement of licentious activities. The other prohibits the public display of indecent pictures and posters.

In addition to the general provisions of the *Penal Code*, France has special legislation relating to children and pornography. First enacted in 1949, the legislation provides for the establishment of a Special Committee for the Surveillance and Control of Publications Designed to Protect the Young. As its name implies, the Committee is charged with the responsibility of reviewing material designed for children. It has the power to prohibit certain publications on the ground that they "present debauchery in a favourable light". It can also make recommendations to the Minister of the Interior, who is empowered to ban publications of any kind that are "dangerous for the young on account of their licentious or pornographic character or the place given to crime or violence".

Films in France are controlled by a combination of section 283 of the *Penal Code*, film classification legislation and a special set of fiscal provisions. The film classification legislation gives the Minister of Information authority over the public showing of films. In the exercise of his censorship and classification powers, he is assisted by a Special Commission for the Control of Films. This body, which has advisory powers only, is made up of representatives from several different ministries, the film industry and other interested groups. In 1975, the Council of State, the highest administrative court in the country, directed the Minister to ensure that, in the exercise of his powers, he gave due weight to freedom of expression. It is generally felt that this direction has resulted in a relaxation of the exercise by the Minister of his broad censorship powers.

An interesting feature of this film classification system is the power given to local mayors to ban particular films. This power is limited, however, and can only be used when opposition to a film is particularly vocal.

Special fiscal legislation dealing with the film industry was introduced in 1975. The legislation is aimed at both pornographic films and films which can be said to incite violence. It calls for a heavy tax on the importation of such films and a higher value added tax on the sale within France of such films and on the admission charge levied by cinemas showing them. There is also a special tax on profits made from such films.

Pornographic films caught by the 1975 legislation have been held by the Supreme Court not to be proscribed by section 283. The 1975 legislation was said to have given immunity to such films insofar as the *Penal Code* is concerned. It appears, however, that this does not mean that *all* films are immune from prosecution under section 283. Films containing particularly detailed depictions of acts of violence and sexual perversions have been held still to fall within the purview of that provision.

Considerable public pressure developed in France calling for the regulation of video recordings. Representations were made to the government that videos had become particular vehicles for pornography. In 1983, the French Parliament made the 1975 film legislation applicable to pornographic videos but did not provide for a system of regulating the material. As a result, videos have been left outside the scope of the regulatory scheme established to deal with publicly shown films.

One additional feature of the French law on pornography that deserves note is section 289 of the *Penal Code*. That provision authorizes organizations of private citizens to participate as parties in prosecutions brought under sections 283 and 284 provided they are first approved by the government. It appears, however, that few groups have made use of this provision.

3. West Germany

In West Germany legislative power is shared between the federal parliament (the Bundesrat) and 10 state governments. Power over criminal law is given to both levels of government, with federal legislation prevailing in the case of conflict. Our analysis focuses on the federal legislation.

The current penal law in the area of pornography was enacted in 1973. A product of compromise between libertarians and moral conservatives, the law is based on a distinction between "soft" and "hard-core" pornography. The offences in relation to the former are found in section 184(1) and (2), and include:

(a) offering it to a person under 18;

(b) displaying it in public;

(c) mailing it to persons who have not solicited it;

(d) exporting it;

(e) presenting it in films in public places where a charge of admission is levied;

(f) presenting it on television and radio.

Offences in relation to "hard-core" pornography, which includes material portraying explicit violence, the sexual abuse of children and bestiality, are limited to the production and distribution of such material. These offences are found in section 184(3).

West German courts have had considerable difficulty interpreting the language of these provisions, particularly the terms used to define "soft-core" and "hard-core" material. The current test of "soft-core" pornography turns on whether or not the material in question gives prominence to sexual acts in a particularly offensive way and with all other aspects of human relations being ignored. If the material does so, then the court goes on to decide whether or not it is aimed exclusively or predominantly at a "lustful interest in sexuality". In applying this test, the courts have made it clear that the portrayal or description of sex organs and sexual acts, including intercourse, will not in and of itself contravene the law.

Insofar as "hard-core" pornography is concerned, the courts have tended not to give broad scope to the offences contained in the *Penal Code*. Some depictions of sexual acts by a child and of children in obscene postures have even been held to fall outside the scope of section 184(3).

The offences created by section 184 are supplemented by a special provision of the *Penal Code* that proscribes the production, display and distribution of violent pornography. This term is defined to include "materials which depict acts of violence being committed against humans in a cruel or otherwise inhumane way and thereby glorify or treat as harmless such acts...." It appears that the courts have been reluctant to convict persons under this provision, however, and the section is seen as having little effect.

As in the case of France, West Germany has enacted special legislation to deal with pornography concerning children. *The Law on the Protection of the Young in Public Places* includes a prohibition against the public presentation of films that are likely to be detrimental to the physical, moral and social fitness of the young. That law also authorizes state authorities to classify films as appropriate for certain age groups (under 6, under 12, under 16 and under 18).

Legislation enacted in 1965 takes the protection of children one step further by empowering a body called the Board of Censorship to put written publications and other materials considered harmful to the young on a special list and thereby prohibit their distribution to persons under 18. The test applied involves determining whether the material in question endangers the moral development of the young. Of particular concern are publications that are "indecent" or incite to acts of violence, crime or racism.

The Law on Commercial Activities stipulates that "sex clubs" offering live sex and "peep" shows are required to obtain a licence from the appropriate municipal authorities. Moreover, the law provides that such licences are not to be issued if the performance given will contravene positive law or morality. In a recent decision, the Federal Court of Administrative Law held that no licences should be issued to clubs offering peep shows. Such shows were said to be an affront to human dignity, in part because of the dehumanizing role played in them by women.

Pornography appears not to be an issue currently causing public debate in West Germany. Women's groups are said to be divided on the position women should be taking on the matter. Some groups call for much tighter control over pornography, particularly the violent pornography featured in some videos. Other groups are concerned that tighter controls will further the interests of moral conservatives and lead to the enactment of legislation that is not in the long term interests of women.

The German government has recently indicated a willingness to tighten up the law in two areas: the protection of children from harmful material and violent pornography. With respect to the former, it is proposed that videos be brought within the regulatory structure already in place for publicly shown films under the *Law on the Protection of the Young in Public Places*. With respect to the latter, it is proposed that the requirement that the publication in question glorify or treat as harmless the violence portrayed or described, be dropped.

4. Denmark

In Denmark legislative power is reposed in the national Parliament. Since 1967 Denmark has been engaged in a process of decriminalizing pornography. Supporters of this process think that the decriminalization of pornography has not only had no harmful effects on Danish society, but has indeed had significant beneficial effects. Other groups dispute this thesis and have expressed dissatisfaction with the evolving state of the law.

Prior to 1967, the basic *Penal Code* provision on pornography, section 234, made it an offence (a) to provide persons under 18 with obscene writings, pictures or objects; (b) to publish or distribute, or import for purposes of distribution, obscene writings, pictures or objects; (c) to arrange or give public addresses, performances or exhibitions of an obscene character; and (d) for gain, to publish or distribute, or import for purposes of distribution, writings or pictures which, although not obscene, had as their purpose commercial speculation in sensuality. Experience showed that convictions were seldom obtained under this section 234. When, in 1965, a Danish translation of *Fanny Hill* was found by the country's Supreme Court not to be "obscene", the Minister of Justice directed a body called The Permanent Penal Law Committee to investigate the area of obscenity and to make recommendations for reform of the law.

The main recommendation made by the Permanent Penal Law Committee was to delete reference to the word "writings" in section 234. This recommendation was accepted by the Danish Parliament and, by a vote of 159 to 13, section 234 was amended accordingly.

Two years later, in 1969, the Danish Parliament took the further step of decriminalizing the publication, distribution, and importation for the purposes of distribution of obscene pictures and objects as well as the arranging and giving of addresses, performances and exhibitions of an obscene character. The other general offence, relating to commercial speculation in sensuality, was also repealed. According to one observer, these additional steps were taken because the predicted beneficial effects of the 1967 amendment, in particular, the diminution of interest in written pornography, had in fact been realized.

In the result, section 234 of the *Penal Code* was limited in scope to protecting children from pornographic material. Even within this sphere, the trend has been in favour of decriminalization. The new section 234 made it an offence to "sell indecent pictures or objects to a person under 16 years of age". Not only had the age limit been reduced (from 18 to 16), the provision was limited to pictures and objects (leaving out writings) and to the *sale* of indecent pictures and objects (leaving out lending, renting, showing, etc.). The term "indecent", which replaced the term "obscene", appears not to be much more restrictive than its predecessor. In order to be "indecent", a picture or object must contain detailed and strongly offensive depictions of sexual topics which cannot be justified by artistic merit or scientific or educational purpose.

The *Penal Code* contains other provisions relating to children and pornography. Section 235, which was introduced in 1980, makes it an offence for anyone, for a commercial purpose, to sell or otherwise distribute, or with intent to do so, produce or procure, "indecent photographs or the like" of children. This is a provision designed to protect children from exploitation by the pornography industry. While such exploitation is itself proscribed in other *Code* sections, police have found it difficult to enforce these sections. The rationale of section 235 is reflected in the fact that it is limited in scope to commercial traffic in photographs. The judgment has presumably been made that there is little if any exploitation of children in the production of non-photographic material. The legislators have also apparently decided that the non-commercial traffic in photographic material is not an appropriate subject for legislation.

The final provision of the *Penal Code* to be mentioned is section 232, which proscribes the violation, "through gross indecency", of "the public sense of decency". This provision is understood to cover such acts as sending, showing or reading pornographic material to unconsenting adults or to children.

The object of protecting the unwilling viewer of pornography is furthered by provisions of the Standard Police Regulations. These regulations, which were enacted at the same time the major revisions were being made to the *Penal Code*, proscribe the public display and distribution of writings and pictures of an offensive character and the distribution of such writings and pictures to the homes of those who have not solicited them. The mailing of obscene material to persons who have not solicited it, is made an offence by Denmark's postal laws.

Legislative reform in the area of film censorship has paralleled that in the area of penal law. Prior to 1969, Denmark's Board of Film Censors had powers similar to those currently exercised by provincial film classification boards in Canada. In that year, new legislation was enacted which eliminated all control over the kinds of films available to adult viewers. Films that were to be shown to children were still subject to control, however, with some films being off limits to children under 16 and others being off limits to children under 12.

A further relaxation of state control over this area occurred in 1972. Previously, licences to operate public cinemas were difficult to get and could be withdrawn if high standards of service to the public were not maintained. In 1972, the legislation was amended to make it easier both to obtain and to keep such licences.

There appears to be no legislation governing the medium of television in Denmark. Films and other shows that are unsuitable for children tend to be shown late at night with appropriate warnings about their content. Videotapes intended for private use are also free from state censorship. A committee set up to examine the question, recommended in 1983 that the state not step in to control videotapes. Instead, it recommended that a tribunal issue lists of videos that children should be encouraged to view, with the lists being posted in libraries and other places to which the public has ready access.

Experience thus far would suggest that those involved in the pornography industry in Denmark are abiding by the rules and regulations. For example, no one has yet been prosecuted under the new (1980) provision of the *Penal Code* relating to the commercial distribution of child pornography. It is said that child pornography disappeared from circulation as soon as it became clear that the new provision would be enacted. Similarly, the public display of pornographic material is said to have dropped off dramatically since the Police Regulations of 1969 were enforced with vigour in the early 1970's.

Polls conducted in Denmark in the late 1960's suggest that a majority of citizens supported the decriminalization of pornography that the Danish government embarked upon. Today, opposition to the lack of control over pornography is coming from feminist organizations and individuals, but the opposition appears to be less vigorous than that currently found in Canada. Calls for dramatic changes in the law appear to be few and far between. Emphasis is placed instead on balancing the degrading images contained in mainstream pornography with images of warmth and eroticism between equals.

5. The Netherlands

In The Netherlands pornography does not appear to be a major concern. What legislative reform there has been in the area in recent years has loosened rather than tightened the reins of state control. The decisions of the courts appear to be consistent with the political trend.

The major penal provision relating to pornography is section 240 of the *Penal Code*. That section, which had its origin in the *Code* of 1911, proscribes the distribution, display or exportation of any written or pictorial material or object that "offends the norms of decency". It also contains a more restrictive provision governing the distribution and display of pornographic material to persons under 18. This latter provision is complemented by section 451 which prohibits the distribution or display of material which is likely to arouse the sexual feelings of a person under 18. Finally, section 239 prohibits all acts performed in public or before a non-consenting audience that "outrage the norms of decency".

Legislation on film censorship was liberalized in 1977. The new law makes no provision for the censorship of films that are shown on television or in adult cinemas. The showing of films to persons under 16 is prohibited unless approval is first received from the National Board of Film Censorship. Approval is given unless the Board is satisfied that young people could be harmed by viewing the film in question.

Local control over pornography is virtually non-existent. This is apparently attributable to the protection accorded freedom of expression in the

Dutch Constitution. Such local control as does exist, is limited to regulations relating to the public display of objects such as sex aids.

On their face, terms like "offensive to norms of decency" and "outrage against norms of decency" would appear to be very restrictive. The judicial interpretation given by the courts is, however, quite permissive. In 1978, in what is considered to be the leading recent decision on the matter, the High Court held that the showing of *Deep Throat* in a cinema that contained warnings about the film's content did not offend section 240. The reasoning in this decision has left many observers with the impression that all that remains to be caught by the law is the public display of pornography and the distribution of pornography to minors.

In 1979 a bill was introduced in Parliament on the basis of recommendations made to the Minister of Justice by a special advisory committee in 1972. Those recommendations, which are said to have had considerable effect on the courts' approach to pornography, entailed limiting the role of the *Penal Code* to proscribing (a) the distribution and display of pictures and objects that "offend the norms of decency" to persons who had not consented to their distribution or display; (b) the distribution to children under 16 of pictures or objects "whose presentation to a minor can be considered harmful"; and (c) the performance of indecent acts in public or in places accessible to minors.

This bill has not yet been passed, however, primarily due to strenuous opposition to it from feminist groups. The opposition has been led by the Council for the Emancipation of Women, an official government body, and by an organization called Women Against Pornography.

Public opinion polls would appear to support a limited role for the state in the regulation of pornography, in keeping with the provisions of the 1979 bill. In a 1981 study conducted by The Netherlands Foundation for Statistical Research, it was discovered that the availability of pornography was rated the least pressing of twenty different social problems. Only three percent of those surveyed considered pornography to be a topic of interest for the population at large.

6. Sweden

Sweden has a reputation as a country that has taken a permissive approach to pornography. During the 1970's that reputation was well deserved, since there was then minimal state involvement. Recent developments suggest, however, that that reputation may no longer be deserved.

The general *Penal Code* provisions relating to pornography came into force in 1970. Section 11 of Chapter 16 makes it an offence for anyone in a public place to "exhibit pornographic pictures by means of displays or other similar procedure in a manner which is likely to offend the public". A similar prohibition exists against sending through the mail or otherwise furnishing pornographic pictures to a person without that person's consent.

It will be noted that these proscriptions are limited to pornographic pictures. Written material is, therefore, not caught by them. However, pictures are understood to include sculptures and films.

The definition of "pornographic" currently in use includes the portrayal of explicit sexual conduct in a provocative manner where such portrayal lacks scientific or artistic value. The test is said to be purely objective in nature, with the "author's" intentions being irrelevant.

The protection of children from pornography is also dealt with in Chapter 16 of the *Penal Code*. Section 12 of that chapter makes it an offence for anyone to distribute to a child or young person a writing, picture or film, the content of which puts at risk his or her moral development. It is also made an offence to distribute pornographic material in a "concentrated" manner to children or young persons. An interesting feature of these offences is the absence in them of any age limit. It is said that the government preferred not to fix any limit because of the differing levels of maturity of young persons. It is contemplated that certain groups of young persons, for example, young men serving in the military, will not be protected by these provisions.

New legislation designed to protect children was introduced into the *Penal Code* in 1979. The new section 10(a) of Chapter 16 makes it an offence for anyone either to portray a child in a pornographic picture with the intent of distributing it or to distribute such a picture of a child. The term "pornographic" here is understood to have a somewhat broader meaning than it has in Section 11 of Chapter 16 and may catch pictures of children in a particular position or making particular gestures. Again, no age limit is prescribed.

Two recent enactments concern live performances and the dissemination of films and videos that feature excessive violence. Pornographic live performances in a place to which the public has ready access are now proscribed. So, too, is the commercial distribution of films and videos that contain explicit or prolonged portrayals of persons being subjected to brutal and sadistic violence. This latter prohibition is buttressed by a special provision dealing with the commercial distribution to children under 15 of films and videos featuring detailed and realistic portrayals of violence, or threats of violence, against adults and animals.

Apart from these criminal prohibitions on films, Sweden has special legislation to control the viewing of films in public cinemas. The National Bureau of Cinemas is empowered to ban films on several grounds, one of which is that the film "can have a brutalizing or otherwise detrimental effect or incite to crime". It is apparent that this would not catch films that are merely sexually explicit. It is understood that the Bureau will only interfere in cases of films that contain sadistic pornography or portrayals of extreme violence and even then only where the scenes in question are unnecessary for the film's development or otherwise without artistic justification.

With respect to films for children (here defined to mean those 14 and under), the Bureau is empowered to limit viewing to children under 7, children between 7 and 11 and children between 12 and 14. The test to be applied is whether the film would have a negative psychological effect on children within these age groups.

Recent statistics indicate that very few convictions are obtained under the *Penal Code* provisions in this area. For example, in respect of section 11 of Chapter 16, the statistics show five convictions in 1971, seven in 1972, five in 1973, none in 1974, one in 1975, and one in 1976. In the view of some observers, this low conviction rate is attributable to potential offenders heeding the warnings of law enforcement officers.

A recent report of a special committee of the Swedish Parliament is less sanguine and is of the view that offences under this provision were common, but, for one reason or another, were not being prosecuted.

In the same report, the special committee (known, significantly, as the Committee for the Freedom of Speech) came to the conclusion that no new legislation was required in the area of pornography. While concerned about the possible harmful effects of pornography, especially on children and the way they view human relations, the committee expressed the opinion that the criminal law was not an effective tool with which to deal with these effects. Rather, efforts to change people's attitudes by positive means had to be undertaken. One recommendation the committee did make was to eliminate the censorship of films intended for adults. Whether this recommendation will be accepted, and the recent trend towards greater state involvement thereby reversed, remains to be seen.

Footnotes

[1] The discussion of the approach to pornography in each of these five countries is based on a study commissioned by the Department of Justice. It is entitled ***Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*** and was prepared by J.S. Kiedrowski and J.M. van Dijk. The study does not contain many footnotes. For that reason the discussion in this Chapter has not been footnoted.

Chapter 19

Conclusions

The overall impression from this survey is that there is a great diversity of approaches to pornography in the countries surveyed. In the first place the pendulum has swung in the direction of liberality much further in some countries, (The Netherlands, Denmark and Sweden), than in others, (England and Wales, Australia, New Zealand, France and West Germany). Secondly, constitutional considerations have made a difference. The United States, which in other areas of the control of morality, for example prostitution, has enacted quite draconian legal provisions, has been much more circumspect about obscenity and pornography. This caution stems directly from the entrenchment of freedom of expression in the First Amendment to the Constitution. The Netherlands seem to have been affected by similar constitutional concerns about the abridgement of freedom of expression.

Geographic and demographic realities may also have made a difference. Both Australia and New Zealand, which are geographically remote and to which access is more easily controlled than in the case of the other countries, have found it feasible to develop pro-active censorship regimes to vet not only film material, but also magazines and books. While some of the other jurisdictions have systems of film censorship and classification, and several have implemented or are contemplating pro-active control of videos, there has been no attempt to develop the comprehensive, preventative legal regimes of the antipodes.

Does the survey reveal any obvious trends? In the first place, although there is, as noted above, a significant gap in liberalization of the law between The Netherlands, Denmark, Sweden and the United States on the one hand, and England and Wales, Australia, New Zealand, France and West Germany on the other, it is apparent that in all the jurisdictions, with the possible exception of New Zealand, there has been definite movement towards a less restrictive approach to sexually explicit material. This has been achieved by legislative and regulatory amendments, as in Australia and West Germany, or through prosecutorial discretion or judicial interpretation, as in England and Wales and France. To some extent at least, a distinction has developed between pornographic material which is violent, abusive and degrading on the one hand, and that which is merely sexually explicit on the other, with the former attracting the legal sanctions, or at least stiffer legal sanctions than the latter.

A second discernible trend, except in The Netherlands and Denmark, is the growing concern of legislators about child pornography. Even countries like Sweden, which took significant steps in the 1960's and 1970's to remove criminal law proscriptions on the production, distribution and sale of pornography, and the United States in which adult pornography is only sporadically attacked, have enacted special legislation or provisions for the protection of children from pornography. The more conservative jurisdictions, especially England and Wales, France and West Germany, either have introduced new provisions on children or propose to do so.

A third and complementary trend to the second is the emergence of a concern about videos. The growth of video technology and of the market for VCRs has produced something of a communications revolution by opening up access to a whole new range of visual material for use in the home. The perceived danger is that children will have virtually uncontrolled access to pornographic and violent images. As a result, a number of the countries surveyed have introduced special legislation which seeks to regulate the distribution, sale and rental of videos, typically utilizing the models of film censorship or classification. Steps along these lines have been taken or are contemplated in England and Wales, several Australian jurisdictions, France, West Germany and Sweden.

In conclusion, the overall picture seems to be one of systems struggling to balance, within the law, a recognition that social attitudes towards sex and sexuality have changed in the direction of greater tolerance of visual representations of a wide range of sexual activity on the one hand, and on the other, that relaxed attitudes have encouraged some in the pornography industry to glorify and profit from the portrayal of violence and degradation, especially of women, and the sexual exploitation of children. The process of reform is being complicated by technological breakthroughs, such as the home video explosion. Insofar as the focus in proscribing or regulating pornography has been to specify that it is the particularly odious forms of pornography which should attract legal sanctions or restraint, it can be said that the trend in the law has been towards defining the ambit of obscenity and pornography with greater precision and particularity than in the past. Again this change is one which is evident in both legislative formulations and the greater care which judges show in characterizing what it is that they find objectionable.

Section IV

Recommendations on Pornography

Chapter 20

The Criminal Code

1. Introduction

In making recommendations about changes in the *Criminal Code* we have drawn together all of the components of the work we have undertaken on pornography. Thus our recommendations flow from the guiding principles which we set forth in Part I, and are reflective of the current situation with respect to the availability and use of pornographic material, the harms which we feel are associated with this material and our views on the proper role of the criminal law in the area.

As we pointed out in Part I, Chapter 2 of the report, the traditional liberal view of the power of the state to limit the freedom of an individual is that the state can only act when the exercise of that person's freedom results in direct, demonstrable harm to others. By contrast the conservative view is that it is legitimate for the state to intervene to prohibit conduct in order to protect and affirm traditional moral values, even if there is no proven harm caused by the conduct to others. Mainline feminist opinion takes the middle ground that the state is justified in curbing the freedom of an individual where his conduct, while not necessarily causative of direct, demonstrable harm to others and regardless of whether or not it offends traditional moral values, does or threatens social harm in the sense that it undermines or subverts important social values and policies. In particular feminists see the equality of the sexes in political, economic, and social matters as so fundamental to the life and fabric of this country that action by the state both to promote and protect it are entirely warranted.

In our recommendations on changes to the *Criminal Code* relating to adult pornography we have applied a definition of harm which embraces not only direct, demonstrable harm to an individual, but also an element of social harm. In essence we see two forms of harm flowing from pornography. The first is the offence which it does to members of the public who are involuntarily subjected to it. The second is the broader social harm which it causes by undermining the right to equality which is set out in section 15 of the *Charter of Rights and Freedoms*.

The first of the two harms we argue should be handled by *Criminal Code* provisions which penalize failure to take steps to protect members of the public from involuntary encounter with pornographic material. The objective here is to encourage control and regulation rather than to proscribe. The second, we feel, requires direct proscription of certain forms of pornographic representations. Conscious of the concern that when the law moves beyond the prohibition of conduct which causes direct, demonstrable harm, there is a danger of excessive intrusion by the state into the lives of individuals, we have focussed on the most extreme forms of pornography. These in our minds clearly subvert the equality rights in the *Charter* and more generally the right of all individuals to be treated with respect and dignity. Moreover, they can be stated with sufficient precision to provide direction to those who have to gauge their actions according to the dictates of the law, and to the law enforcers so that undesirable interferences with freedom of expression are minimized.

We appreciate that our proscriptions will not satisfy everyone. Those of conservative mind will consider us too libertarian in our view that the bulk of pornography should be regulated rather than banned. Some feminists too may feel that we have circumscribed the pornography which is to be prohibited too narrowly. Liberals for their part may find our movement outside the traditional boundaries of harm untenable. It is our belief that, given the complexities of this area, and the conflict of philosophies to which it gives rise, our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance over the present state of the law.

2. Terminology

We were often told during the public hearings that a useful starting point for the reform of the law relating to pornography would be to remove the term obscenity from the *Criminal Code*. Along with obscenity would go the heading of the part of the *Code* in which it appears: "Offences Tending to Corrupt Morals".

Those who pressed for the removal of the term "obscenity" did so primarily because of their perception that sexual immorality was not really the essence of the offence in the pornographic material available today. Rather, in one way or another, the material is demeaning and degrading to women, to members of minority groups who may be portrayed in a distorted way, and ultimately to men, who are often depicted as soulless aggressors.

For some advocates of the change in terminology, the issue is not as ideologically significant. They are motivated by various reasons, ranging from a desire to signal a new approach, to a dislike of existing obscenity jurisprudence.

We agree with the suggestion that the term "obscenity" has outlived its usefulness. As we have discussed at some length in chapter 4, entitled "What is Pornography?", the fact that the dictionary definition of "obscenity" transcends the legal definition in the *Criminal Code*, and that the imprecise terms of section 159(8) have produced more confusion than light mean that the word has little to offer as a term of legal art. Moreover, we think that the heading, with its emphasis on the corruption of morals reflects an outdated concern, one which deflects attention from the real nature of the problem which the criminal law should be addressing, the denial of human dignity.

Recommendation 1

> **The term "obscenity" should no longer be used in the Criminal Code, and the heading "Offences Tending to Corrupt Morals" should also be removed.**

We have already stated that we do not plan to make the term "pornography" central to the definitions in our proposed amendments. It is simply too elusive to provide the precision needed in the criminal law. However, we do not consider it worthwhile to eschew the term altogether. It does convey an idea about the material we are seeking to control and an entirely new term is not only difficult to find but may not be as accurate. Accordingly, we use the term pornography in our proposed sections, although we have been sparing in that use. The most obvious use is that in the various headings we have given to proposed sections. We see as quite acceptable the use of the term pornography in this way, because any elasticity in the title is limited by the specific terms of the section or subsection. Moreover, in the title, it serves as a useful indicator of the shift in approach from a traditional moral concern with obscenity, to our more functional social concern with pornography.

The term "pornography" appears rarely in the draft sections. In a few sections, we use the term "visual pornographic material", which is defined in quite particular terms to minimize discretion or subjective considerations. This definition is the only place in the draft provisions which actually features the term "pornography".

Recommendation 2

> **New criminal offences relating to "pornography" should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.**

3. Violent and Degrading Material

In discussing the meaning of the word obscenity, in Chapter 4, Section II, we made the point that there is some material which would be considered obscene, but which would not be considered pornographic. Violent material which has no sexual connotations, and disgusting material, are the two large categories of material which might well not be caught by a "pornography" approach. We note with some interest, of course, that although common understanding might include the explicitly or extremely violent within the term obscene, because it causes revulsion, the present criminal law does not prohibit material featuring only violence.

The mandate of the Committee was to study the effect and make recommendations with respect to the material that has some sexual content. At the present time the *Criminal Code* considers potentially "obscene" material in which sex and one of a number of other items is present, namely, crime, horror, cruelty or violence. As we have reviewed the material which is available and listened to people across the country, the issue of whether violence in and of itself can be so offensive or harmful that some restrictions on it are needed arose quite frequently.

Virtually everyone who raised the issue thought that violence on its own can indeed be obscene. In fact, some people who raised the issue believed that violence in the media was more of a problem than explicit sexual portrayals. The term "obscene" used in the *Criminal Code*, could, in our opinion, easily include more than just sexual material, although as we have indicated it does not currently do so. We did consider whether the retention of the term obscene would be preferable because it could allow for offensive non-sexual material to be caught. We decided, however, that we would not recommend such a course of action because it would be building yet more meaning into a term which is already highly problematic. Our focus has been on pornographic material and we propose significant changes to the way in which the *Code* deals with such material. We have not examined in any detail the problems associated with violent material that has no sexual content. Nevertheless, having given some attention to the matter, we are of the opinion that the government should give consideration to establishing a section in the *Code* which would deal with violent material in a manner similar to the one we are proposing for sexual material. We realize that a sanction against violence is potentially far-reaching and intrusive and careful study is necessary before changes to the law can be recommended.

Recommendation 3

The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.

There is at least one offence in the present *Code* which does relate to disgust: subsection 159(2)(b) prohibits the public exhibition of a "disgusting object". In our view, little that is necessary for the protection of basic values would be lost by removing altogether the penalties against material that is disgusting, provided that the criminal law regime we are recommending is in place. We have reached this conclusion because we have tried to address in our proposed sections the real harms which we think were aimed at by the prohibition against such material, like the public display of sex aids. In particular we have replaced the prohibition on the public exhibition of disgusting objects, with a section aimed at preventing access (by way of sale or display) by children to devices intended for use as sex aids. This is found in the part of the report relating to children.

Recommendation 4

There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence relating to a disgusting object.

4. What to Control?

It was apparent at the public hearings that many people thought that the portrayals of women and children in the media generally were distorted and false depictions. We were frequently reminded that women are often seen in limited and mindless roles in television programs, as overwhelmingly concerned (to the exclusion of other interests) with marriage in popular paperback series, and as people whose sexuality can be used to sell virtually any commodity. On this view, pornography is one variant of a pervasive and dominant theme that runs through all the media, albeit a more extreme variant than some others. The argument has been raised, however, that pornography may be less harmful than the everyday, run-of-the-mill depictions in the media which we so often take for granted. This view stems from the belief that, as widespread as pornography is, the mainstream media touch the lives of virtually every single Canadian whether man, woman or child. Therefore, to seek to control what is probably a small percentage of the false depictions and leave out of the picture the vast majority of them is inconsistent and most certainly not going to achieve the result which we are ultimately seeking, that is, a reduction or elimination of such depictions.

While the Committee has every sympathy for this view, we do not believe that the elimination of false depictions of women can be achieved through *Criminal Code* provisions. What is required is re-orientation of the values and priorities of the media. This is not something that can be addressed through criminal law. Given the sheer volume of material which would be involved, criminal sanctions would not be effective and more likely to bring the law into disrepute than to solve the problem.

Moreover, broad based support is lacking at this time for the view that the content of the media is in need of the sort of re-orientation we have heard suggested. Certainly, many women's organizations see this as an important issue, one to which they are continually and effectively drawing people's attention. Similarly, religious and ethnic associations have been concerned about how they are portrayed in the media. But the efforts of these groups, especially women's goups, are quite recent in origin and have not, we think, been accepted into our everyday assumptions about the media and its content. That we are moving in the direction of accepting them is seen by the adoption of new content guidelines by the CRTC and amendments to the *Broadcasting Act*. However, these changes have not been accomplished simply for the asking, but have involved long and intensive lobbying and negotiations between interested groups, governments and the media.

We are, therefore, in need of extensive educational and informational programs to address the concern that some have about general media content and its portrayal of people. The use of the criminal law is neither an appropriate nor a practicable means for counteracting such a pervasive problem. That is not to say that legal strategies are inappropriate. Given the existence of regulations governing the media, it is certainly legitimate in our view to use the regulatory process to address these issues. Indeed, the Committee makes a series of recommendations relating to the control exercised by the CRTC over programming which are designed to combat sexist messages in the broadcast media.

The question then becomes whether or not there is any material which is so extreme or harmful in its depictions that it is qualitatively different from the general content and for that reason deserves to be treated differently. In essence, is there any material which should be subject to criminal sanction if it is produced, sold or displayed, for example? Canada, along with other western countries has so far answered "yes" to this question.

As we have already noted, we are convinced that some material of a sexual nature can be so damaging to individuals and society that it must be the subject of the criminal sanction. The crux of the issue, of course, is to define the precise nature of the material which should be prohibited or regulated in such a way as to include only the specific sorts of things which are harmful. Our ability to do this depends on our understanding of what it is about the material which causes the damage.

It is, in our view, a significant social fact that many people are offended by some kinds of material. They would not choose to view it, if given a choice, and they are offended or upset when they cannot avoid seeing it. These feelings of offence and disgust can, in our estimation, justify restraints on the display of pornography, although we do not think that these sentiments would justify criminalization of, say, producing the material. The feelings of embarrassment of individuals, no matter how many, are not a proper basis for a substantial curb on freedom of speech.

How far should the boundaries of control be extended beyond restraints on display of offensive material? As our analysis of pornography in Canada today, in Chapter 6 of Section I demonstrates, we do not have consistent and conclusive research data to tell us about all the effects of pornography and in particular whether direct, demonstrable harm is caused, and we cannot be drawn too far into surmise or speculation. Our approach is characterized by acceptance of the egalitarian argument that impairment of a fundamental social value can properly be regarded as a "harm" meriting legislative control.

Proceeding from this point of departure, we have developed a three-tier analysis of pornographic material. The first tier is material which we would subject to a criminal sanction, with no defences based on artistic merit, educational or scientific purpose. The penalties for the offence are strong. In this tier we place the following: a visual representation of a person under 18 years of age participating in explicit sexual conduct and material which advocates, encourages, condones or presents as normal the sexual abuse of children; and visual pornographic material which was produced in such a way that actual physical harm is caused to the participant or participants.

The case with respect to these forms of pornography has been made very fully in the part of the Report dealing with children and we do not intend to repeat it here.

With respect to the remaining category, there are, in our view, two reasons for prohibiting visual material in the production of which actual physical harm was caused to the person or persons depicted. The first and obvious one is to protect those who participate in the production of visual pornographic material from physical harm. It is likely, of course, that in the case of material produced ouside Canada the acts that would result in such harm being caused would themselves be caught by the criminal law of the country in which they were committed. With domestically produced material, other provisions in the *Criminal Code*, for example those relating to assault, might be applicable, especially if no consent to the physical harm was evident. Be that as it may, it seemed to us, as it seemed to the Williams Committee, to be appropriate to provide this additional deterrent to the causing of such harm. We know that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter. Clearly, if the commercial dealings in material of this kind could be stopped, the reason for producing it would disappear.

The second reason for prohibiting this material lies in the message that most, if not all, of it conveys. That message is that it is acceptable to cause physical harm in the context of sexual relations. Whether or not it can be demonstrated empirically that this message is absorbed by the viewer, and acted upon, we believe that it is appropriate to use the criminal law to prohibit its dissemination. The social harm which is caused by the undermining of human dignity and the challenge to the equality of women is as stark here as it is with mere representations of physical harm. We elaborate on this facet of harm in our discussion of tier two material below.

We do not anticipate that this provision will often be activated. We doubt that the causation of actual physical harm is a widespread problem in the production of pornography. Moreover, there are obvious problems of proving that harm was actually caused. However, it will be available for dealing with the occasional outrageous case.

Far more pervasive is the material in which physical harm or abuse is represented in simulated depictions. This material which we consider offends equality rights and the more general right to respect for human dignity is dealt with in the second tier and is labelled "Sexually Violent and Degrading Pornography". Unlike the material in tier one, that in the second tier is subject to the defences of genuine educational or scientific purpose, and artistic merit. The rationale for allowing defences is set out below in our discussion of the new formulation of section 159 of the *Criminal Code*.

We consider it important to comment at some length on why we have included this second tier, and the character of the harm which we feel justifies the intrusion of the criminal law at this point. As we stated in the introduction to this chapter we have concluded that the legitimate ambit of the criminal law extends beyond the causation of demonstrable, tangible harm to an individual or individuals. While recognizing the concern which liberals have that to extend the reach of the criminal law further is to open the door to abuse and possibly tyranny, we believe that there are values and policies which are so important to the welfare of Canada that they are worth protecting in their own right, even by criminal sanctions. This position which we have adopted seems to us to accord with the view taken by both the Law Reform Commission of Canada and the Department of Justice in their studies on the purposes of the criminal law.[1] As we have noted in our discussion of the role of criminal law in Part I, Chapter 2, the two studies see the criminal law as having both the prevention and penalizing of harm to the individual and the protection of social values as legitimate objectives.

More importantly, we believe that the *Charter of Rights and Freedoms* expressly recognizes that certain social values and policies, in particular equality "before and under the law" and "equal protection and equal benefit of the law" are entitled to both constitutional affirmation and protection, and take their place alongside the traditionally protected freedoms such as freedom of conscience, religion, thought, belief, opinion and expression. In our minds there are two possible legal consequences which flow from this recognition accorded to equality rights. In the first place it may be argued that the effect of section 15 of the *Charter* is to limit the ambit of freedom of expression in section 2(b) to exclude forms of expression which offend equality rights. The alternative position one can take is that the combined effect of section 15 and section 1 which comtemplates reasonable limitations on the rights and freedoms set out in the *Charter* is to validate reasonable legal constraints, including those of the criminal law, on the exercise of rights and freedoms by individuals or groups which adversely effect or threaten the rights in section 15.

While observations on the effect of the *Charter* are in many respects still speculative, we note that the position which we have taken does have judicial support in the careful judgement of Mr. Justice Quigley of the Alberta Court of Queen's Bench in *R. v. Keegstra*,[2] a decision to which we have already referred to in Part II, Chapter 8, where we discuss the general impact of the *Charter* in relation to the issue of pornography. Mr. Justice Quigley in addressing the issue of whether section 281.2(2) of the *Criminal Code* (wilfully promoting hatred against any group by communicating statements) was an infringement of "freedom of expression" under section 2(b) of the *Charter* made the following remarks:

> Section 15 of the *Charter* guarantees a right which rationally flows from our affirmation that men remain free only when freedom is founded upon respect for moral and spiritual values. We have recognized that Canadians have a moral sense, that is a sense of what is good and what is evil. Section 15 also manifests in the concrete as opposed to the abstract, our affirmation that each human person has dignity and worth...[3]
>
> In my view, the wilful promotion of hatred under the circumstances which fall within section 281.2(2) of the *Criminal Code* of Canada clearly contradicts the principles which recognize the dignity and worth of the members of identifiable groups, singly and collectively; it contradicts the recognition of moral and spiritual values which impels us to assert and protect the dignity of each member of our society; and it negates or limits the rights and freedoms of such target groups, and in particular denies them the right to the equal protection and benefit of the law without discrimination.[4]

The judge concluded that section 2(b) of the *Charter* did not contemplate "an absolute freedom permitting an unbridled right of speech or expression". Furthermore, if he was wrong in this view, he found that section 1 provided a basis for balancing that freedom against the furtherance and protection of desirable social policies and values with which it conflicted in certain contexts. After carefully assessing the rationality and proportionality of the *Criminal Code* provision, and comparing it with the laws and customs of other free and democratic societies, he concluded that the "promoting hatred" provision in the *Code* constituted a reasonable limitation on freedom of expression.

We agree with the views and sentiments expressed in Mr. Justice Quigley's judgement, and we believe that they have application in the present context. In the same way that freedom of expression may not extend to statements wilfully promoting hatred, or be outbalanced by the need to protect the equality rights of others, so the same conclusions can be reached in the case of certain forms of pornographic representations. We believe this to be so in particular in those cases in which the pornographic representation depicts a particular group, typically women, as less than human, and their mistreatment as a legitimate subject of sexual stimulation, typically male. We observe that section 15 of the *Charter*, insofar as it addresses the equality rights of women, represents the culmination of a long and agonizing process whereby Canadian society has come to accept and to commit itself to the policies and values associated with equal treatment of the sexes in the political, economic and social spheres. This has been reflected in both legislative and policy strategies to improve the position of women in employment, education, within the social welfare system and within the family unit. Indeed, it is a set of policies and values to which the present government has given its unqualified support in recent policy announcements relating to equal opportunity in employment. In our opinion the most hateful forms of pornography are subversive of policies and values favouring equality. While it may be difficult to characterize the representations as amounting to the promotion of hatred, they do contain a clear message that half of the Canadian population are entitled to nothing better than violent, sexual abuse, all in the cause of the supposed sexual and psychic welfare of the other half. They do so in a context, that of sexual relations, in which a combination of a desire to dominate and emotion can pose significant dangers to the female partner. As we pointed out in Part I, Chapter 2, we recognize the importance of sexuality to a person's status as an adult, and the need to respect that facet of the physical and psychic welfare of each individual. However, we also believe that there are necessary limits to how that sexuality is manifested. In our view the limits of tolerance are reached when domination and violence infect the relationship. While it is not proven that representations and depictions of sexual violence pose the same threat to the welfare of women as the conduct itself, we are of the view that they lower the status of women and thus contravene their right to equality. In fact they strike at the very root of the policies and values of Canadian society, which, as Mr. Justice Quigley observed, are premised on the dignity and worth of all its members.

We recognize that sexually violent and degrading pornography is not limited in its focus to the abuse of women. There is some material produced in which similar conduct is depicted in a homosexual context. It may be difficult to bring these representations within the ambit of section 15 of the *Charter*. However, we are of the view that while that may be true, the material nevertheless offends the value of respect for human dignity of which Mr. Justice Quigley spoke in *Keegstra* and which is obviously broader in its scope than section 15. Accordingly, we think that a proscription against it of the type we suggest can be justified as a reasonable limitation on freedom of expression and thus saved by section 1 of the *Charter*.

Having taken this stand we are of course aware of the limitations of the criminal law in promoting and protecting values, especially where there is no or only speculative harm being caused. Moreover, we know that the criminal law can be a blunt and inappropriate instrument for working social change. We are, however, confident that with careful attention being paid to the material which we see as destructive of the social consensus which we refer to above, and the clear articulation of the conduct which we think should be proscribed, a valid statement of criminal law can be made, which not only sets out with clarity the limits of what is acceptable and unacceptable in Canadian society in terms of pornography, but also which can be enforced effectively without creating unwarranted curbs on freedom of expression.

Although it is mainly violent and sexually abusive material which we have focused on in framing our second tier recommendations for amendment of the *Criminal Code*, we have also thought it appropriate to apply the criminal law to representations which, while they do not offend the equality provisions of the *Charter* do depict conduct, such as incest, bestiality or necrophilia, which is considered socially repellent and personally degrading. We find it difficult to see how representations of such conduct would be protected by freedom of expression. Even if that freedom was extended that far, we believe that the concern to uphold social values, which is evident both in deepseated revulsion to this type of behaviours, and in its criminality, justify reasonable limitation of the freedom in terms of section 1 of the *Charter*.

Having stated the Committee's views in respect to sexually violent material, we do acknowledge that our rationale for including some material within the purview of the *Criminal Code* will not be universally acceptable. Some people will still argue that we need a stronger and more direct relationship between the use of pornography and identifiable harms to particular individuals. In addition, there will be a more general concern about how the legislation might read. It is obviously important that the legislation not inadvertently encompass material that lacks the harmful effects of the material at which the legislation is aimed.

It was this latter problem that led the Committee to recommend that sexually violent and degrading material be prohibited and to state as clearly as possible what we mean by those terms. We have consciously rejected the use of broad terminology which would leave the characterization of the material to a test, such as the present test of community standards of tolerance.

The community standards test has been soundly criticized by everyone who has been affected by decisions made under it. Most of the criticism is directed at the impossibility of knowing what the Canadian (i.e. national) community standard is. It has been pointed out by judges, and demonstrated by other judgements, that the standard is subject to regional variation. Moreover, the standard changes over time so that publishers, for example, can only guess at what the standard is in any given year. Furthermore, while a changing standard has some value to it in that it ensures that the law does not become completely out of tune with current realities, it does give rise to what some people at the public hearings referred to as "creeping gradualism." (In the minds of some it was not so much creeping as galloping.) That is, the most extreme material which is allowed becomes the standard against which everything else is measured. The technique of publishers, therefore, who do not want any restraints on what they can produce is to constantly push the boundary of what is considered to be outside the law.

A further criticism of this test is that it lacks a principled foundation. Simply because a majority of Canadians are said to tolerate or not tolerate something tells us nothing about their reasons for doing so and hence gives us no opportunity to decide whether they are indeed valid. It is our view that decisions in respect to criminal charges should be made on the basis of clearly articulated principles and not on the basis of majoritarian impulses.

Much of the material which people brought to the attention of the Committee was presented as material which degrades women. While we have argued that some pornographic material is harmful to our fundamental values, and in this sense we have concurred with those who see it as denying women equal status with men, we have nevertheless not used the term "degrading" in our proposed amendments to the *Criminal Code*. The term appears as a heading to the material which we believe is the most subversive of social values. In this sense it is an appropriate heading for the section since it highlights what we consider to be the problem with the material. We have not, however, used the term in our specific recommendations because we consider it to be too imprecise and too broad in its connotations. As we have argued, much of what appears as mainstream pornograhy could be characterized as degrading to women. We do not want to run the risk of our definitions being cast so broadly that they are struck down by the courts on the ground of vagueness or because they catch too much. Furthermore, the use of the term "degrading" would result in a more subjective element being introduced into the assessment of the material. The variable scope ascribed to the term "degrading" during the public hearings, and the occasional but worrying challenges made to literary works which treat sexual relationships openly and sensitively illustrate the difficulties which exist with interpreting such a term. We have tried as far as possible in framing our recommendations to minimize the opportunities for subjective judgements. Our approach here, as elsewhere, has been to state what depictions or descriptions are unacceptable as precisely and clearly as we can.

The third tier of materials is one which we do not consider merits criminal sanction, except in very narrow circumstances. This third tier consists of "visual pornographic material", defined as material in which is depicted vaginal, oral or anal intercourse, masturbation, touching of the breasts or genital parts of the body, or the lewd exhibition of the genitals. Although the language of the definition is broad enough to include both explicit material involving children and sexually violent pornography, we wish to make it clear that in our view, neither of these kinds of materials falls within tier three. These two forms of materials fall into tier one and tier two respectively.

In drafting this provision, we have been mindful of the difficulties of trying to devise a comprehensive list of activities, the depiction of which is to be controlled. These difficulties led the Williams Committee to recommend, instead of a list, a test of offensiveness, which turned on the sensibilities of the "reasonable person". We have concluded that such a flexible test would be more problematic in its operations than the use of a list. The latter is likely to provide clearer guidance on the type of material which is caught. While our list may require further refinement, we are inclined to believe that it is adequate to the task of characterizing tier three material.

It will be noted that we have employed the term "lewd" to describe certain of the representations in the definition. We do this because we wish to make it clear that it is not all representations of the breasts or genitals which should be caught by this definition. It is obviously important to distinguish a poster centre fold of *Playboy* which should be caught as tier three material, and a poster of Michaelangelos' *David* which should not. The use of the adjective "lewd" is designed to allow the law to discriminate between what is patently offensive when displayed in public and what is not.

We think that the only problem which merits the application of the criminal law in connection with tier three material, is that of display. Accordingly, we have proposed criminal penalties for displaying the material without a warning in premises to which the public has access, as well as the restrictions on sale to and access by children which is included in the children's part of this report. We believe that the provisions provide the necessary safeguards against involuntary offence and the exploitation of children without curtailing freedom of expression.

Although we have devised this three-tier approach primarily to guide our thinking on the criminal law, we believe that it also serves to rationalize, as well, the relation between the federal and the provincial spheres. In our view, the proper approach is for the provinces to concentrate their regulatory efforts on the tier three material. We would hope to see a regime in which, apart from the recommended display offences, tier three material is entirely regulated by the province. The main question with respect to this material is availability, so that its potential to create offence to adults or do harm to children will be contained. Provincial film regulation schemes and municipal display by-laws seem particularly well suited to this role.

We have agreed in Chapter 14 on film classification and censorship that film and video material which does not fall within the proscription we have recommended in the *Criminal Code*, should be subject to classification rather than censorship. Accordingly, in the case of film or video material which falls within tier three the application of a classification or rating system, with attendant warnings and entrance restrictions, would seem to us the most satisfactory way of dealing with the display problem. In the case of hard copy material, especially magazines, we believe that municipal regulation requiring warnings, barriers, or opaque covers is an appropriate method of responding. Provincial law and municipal by-laws of the type mentioned above would also have application to tier two material which is protected by the defences of genuine educational or scientific purpose or artistic merit.

Recommendation 5

> **Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, bestiality, incest, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.**
>
> **Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter or performance which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.**
>
> **Material or productions in the third tier would attract criminal sanctions only when displayed to or performed before the public without a warning as to their nature or sold or made accessible to people under 18. Unsolicited mail incorporating such material is also included. In tier three is visual pornograhic material or performances in which are depicted vaginal, oral, or**

anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

5. Offences Relating to Pornographic Material

5.1 Section 159

The basis upon which we have constructed this replacement for section 159 has been discussed in the first part of this chapter, and so we will not repeat it here. However, we do wish to highlight certain features of the proposed legislation.

The first thing to note is the terminology we have used. We have tried for the most part to be specific in our choice of terminology, avoiding the use of vague words such as "degrading". As a result, we have drafted our offences in terms of descriptions of certain kinds of acts. The offences in relation to tier two material, for example, contain a list of acts like incest, bestiality and necrophilia. These acts are, in and of themselves, criminal offences. The term "sexually violent behaviour", which also appears in the list, is defined to include "physical harm depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer". This general part of the definition recognizes that the element of context has an important role to play in determining whether portrayals of physical harm are wrongful. More especially, it embraces the combination of violence and sexual conduct, and violence and sexual stimulation which we consider to be so destructive of the dignity and worth of human beings in general, and women in particular. To supplement the general formulation, we have given specific examples, like murder, and self-inflicted harm. All of the elements of this list except for self-inflicted harm are, once again, crimes. We include self-inflicted harm because it is typically portrayed in a context which makes it appear that the actor, usually a woman, enjoys and deserves the pain. This we see as just as objectionable as the representation of physical violence by others, which suggest the legitimacy of such conduct, and worse still, its acceptance by the victim. By thus staying close to what is itself criminal in formulating our definition, we hope to avoid making it so broad that it would catch images which, while perhaps objectionable, should not be criminalized. We wish to note in this connection the two definitions of "visual pornographic material" which appear in the proposed section. One of them, which applies in the case of section 159(1), reflects both the sexually explicit and the sexually violent. However, when we come to define "visual pornographic material" in dealing with the offence of displaying tier three material, we have removed from the definition the phrases sexually violent behaviour, necrophilia, incest and bestiality. We also specify that this class of representations does not include pornographic representations of children, material advocating the sexual abuse of children, or material in which it appears that harm was done to the participants.

In drafting the offences to deal with tier one and tier two material, we have maintained the distinction now made in section 159 of the *Code* between those who produce and distribute prohibited material and those who are involved in the retail trade in such material. In our view, a distinction along these lines is appropriate in this area [illegible] reasons. First, it allows for recognition to be given in the *Code* to th[illegible] that producers and distributors of material of this kind are in a better position to know its content than are retailers. Recognition of this fact, which is now reflected in section 159(6) (i.e. that ignorance of the nature or presence of the material is no defence) we have embodied in both a new section 159(5) and a new section 159(6). The former is a slightly revised version of the existing 159(6); it provides that it is no defence for a producer or distributor to show that he was ignorant of the character of the "matter or thing" in question. The latter makes provision for a "due diligence" defence for retailers.

The "due diligence" defence is intended to protect the responsible merchant who tried to review the materials coming into his establishment, and to comply with the law. We realize that merchants are not going to be able to interpret in every case what is and is not within the section. However, the fact that they have tried will be of help in the event of a prosecution. The conduct we wish to deter is that of the merchant who accepts without question any material provided by a distributor, and pays no attention to those whose rights are adversely affected by it.

The second reason for distinguishing between producers and distributors on the one hand, and retailers on the other, lies in the need to ensure that the punishment fits the crime. In our view, the production and distribution of prohibited material has to be treated more harshly than the retail trade in it. It is well known that it is in the production and distribution of this material that the real profits are made, and the penalties for such activities must be severe if the law is to have any significant deterrent effect.

In proposing that this distinction is to be continued, the Committee has not forgotten that the Ontario Court of Appeal has held that the existing section 159(1)(a) and section 159(2)(a) overlap to some extent.[5] It is clear that, to the extent that these two offences do overlap, the purposes underlying the distinction are defeated. We have attempted to deal with this problem both by making it clear that the rental of prohibited material is caught by the retailing offence and by removing the word "circulates" from the producing and distributing offence. We are not overly confident, however, that these changes will succeed in overcoming the Ontatio Court of Appeal's decision. It may be, therefore, that further changes to the language used in these sections will be necessary.

It will be noted that in our formulation of section 159(2), Sexually Violent and Degrading Pornography, we have included the defences of genuine educational or scientific purpose, and artistic merit. It is important that we state our reasons for these exceptions which are contained in section 159(2)(d) and (c).

The defence of genuine educational a scientific purpose reflects our belief that in certain contexts the production, distribution and sale of this material may be quite legitimate. While descriptions of incestuous relationships of the sort described in some entertainment magazines are clearly not tolerable very detailed descriptions of incestuous relations, perhaps with explicit photographs of the physical harm done to a young victim of incest by an adult, are entirely appropriate within a medical setting or the training of professionals who work with families in trouble. Here the material is acceptable or unacceptable not on the basis of what it describes or depicts but on the basis of its purpose. However, materials produced for genuine educational or scientific purposes may be sold for less noble reasons. We have provided for this contingency by relating the defence in the case of retailers both to the original purpose of the material and the purpose of its sale.

Some people will argue that there can be no such thing as an artistic defence of material which is sexually violent. Because the depiction meets some academic or elitist concept of artistic does not make it any more acceptable. While we have sympathy with this view we consider it essential to provide for such a defence in order properly to balance the competing rights of equality and freedom of speech. Both of these are entrenched in the *Charter* and clearly the law cannot be used to support one to the total exclusion of the other. Artistic and literary endeavours are a vital component of our society and as such have to be protected and encouraged. That they sometimes raise uncomfortable questions, treat controversial topics and present unpopular views is to be expected. It would not be acceptable to us to say that the matters dealt with in the second tier cannot be presented in artistic works. Indeed, to say so would be to put a significant range of artistic and literay material dating back to antiquity at risk. We wonder, for example, how these two ancient Greek classics, "Oedipus Rex" and "Electra", and the work of the Roman historian Suetonius would fare without such a defence. In some cases the need to protect freedom of expression must predominate.

We note in passing that the Committee has considered two different approaches to artistic works that might fall within the ambit of our second tier. On the one hand, it can be argued that because the work in question is, indeed, artistic, its message is different from, for example, the message in a similar depiction or description in an "adult entertainment" magazine. The fact that it is art, on this view, transforms the depiction or description into something which is no longer harmful. On the other hand, it might be said that both the artistic work and the adult magazine contain an equally harmful message but that in the former case the genre is of sufficient importance that we will nevertheless protect it. While the Committee has adopted this latter view, it should be noted that the question of whether works of art can be pornographic or whether those terms are mutually exclusive has been the subject of considerable discussion in academic literature.

We recognize, of course, that these defences, especially that of artistic merit, introduce a subjective element into the determination of what is pornographic for the purposes of the criminal law. Given our concern to strike a balance between the protection of equality rights, and freedom of expression, we cannot see how that can be avoided. Moreover, we are of the view that decision makers with the benefit of the evidence of expert witnesses will have less of a problem distinguishing what is artistic from what is not than they do with applying the present slippery test of what is obscene. Instead of trying to define the answer to the broader question of what the Canadian community would consider tolerable, they will have to reach a determination of artistic worth by considering the producer or maker's purpose, together with its status within the artistic or literary community. While this will no doubt be a challenging task, we think that it will be a manageable one. The process of decision making is certainly assisted by section 159(2)(h) which establishes the contexts in which the impugned material is to be judged and differentiates them depending upon whether the material is part of a more extensive production or story, or merely a detached segment.

We have included within section 159(2)(c) a display provision relating to Sexually Violent and Degrading Pornography. We think it important to distinguish this method of dealing with proscribed pornographic material from its sale and rental, in particular because it is necessary to provide for material which falls within the exceptions allowed by section 159(2)(d) and (e). It would obviously not make sense for material which, were it not for its purpose or character, would be proscribed, to be displayed openly and without regulation.

It will be noted that in relation to both exempted sexually violent and degrading material by section 159(2)(g) and tier three material by section 159(3)(b) we have stipulated that no one shall be convicted of the offences where an adequate warning notice has been located where it can be seen by those entering the premises or part of the premises which contain pornographic material. The Committee considered whether an exemption should be included for museums, art galleries and the like. Some of its members felt a little disconcerted by the realization that establishments like the Royal Ontario Museum, for instance, might be required to post warning notices because of concern about the possibility of pornography lurking within their walls. Attempts to draft such an exemption floundered on the issue of how to ensure that the exemption would only be available to legitimate establishments of this type. For this reason an exception has not been included.

The penalties provided in the draft section are intended to reflect our view of the seriousness of these offences. Many of them are higher than the penalty now provided for breach of section 159. Where possible, we have specified the amount of the fine which can be imposed by a court convicting someone of a summary conviction offence. Subsection 722(1) of the *Code* provides that where there is no other provision made by law, a fine of $500 or six months imprisonment or both can be imposed for a summary conviction offence. While we have no objection to the six months imprisonment, and reflect that in our sections, we consider that the maximum fine of $500 was far too low. In some cases, we have made that a minimum fine.

Because of the provisions of paragraph 647(b) of the *Code*, we cannot impose these higher penalties upon a corporation convicted of a summary conviction offence. Elsewhere, in Part IV on Children, we recommend that paragraph 647(b) be amended, so as to provide for a higher penalty for a corporation convicted of a summary conviction offence, or to allow the drafter to attach to any particular offence a penalty higher than that set out in paragraph 647(b).

We have, however, provided for a penalty against an officer of a corporation who is implicated in the commission of the offence. We believe this to be essential in making it clear that legal responsibility for the production, distribution, sale, rental or display of this material is both a personal and a corporate responsibility. More particularly it obviates the possibility that the human agents in dealing with the material will try and shield themselves by shifting responsibility to the corporate entity.

Finally, we have incorporated a forfeiture provision in proceedings under section 159(1)(a) and (b) and 159(2)(a) and (b) which allows the Crown to dispose of offensive materials and copies thereof. This power is important, if the full implications of a conviction are to be realized. Without it, it would be all too easy for other distributors or retailers to continue dealing in the material which had produced a conviction, leaving to the Crown the sole recourse of further prosecutions.

Recommendation 7

Section 159 of the Criminal Code should be repealed, and replaced with the following provision:

PORNOGRAPHY CAUSING PHYSICAL HARM

159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was produced in such a way that actual physical harm was caused to the person or persons depicted is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(c) "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia,

masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY

159(2)(a) Everyone who makes, prints, publishes, distributes or has in his possession for the purposes of publication or distribution any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest, or
(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or has in his possession for the purpose of sale or rent any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest, or
(iv) necrophilia

is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or
(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1,000 or to imprisonment for six months or to both.

(c) Everyone who displays any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest; or
(iv) necrophilia

in such a way that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of

(i) an indictable offence and is liable to imprisonment for two years, or
(ii) an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1000 or to imprisonment for six months or to both.

(d) Nobody shall be convicted of the offence in subsection (2)(a) who can demonstrate that the matter or thing has a genuine educational or scientific purpose.

(e) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing has a genuine educational or scientific purpose, and that he sold, rented, offered to sell or rent or had in his possession for the purpose of sale or rent the matter or thing for a genuine educational or scientific purpose.

(f) Nobody shall be convicted of the offences in subsections (2)(a) and (2)(b) who can demonstrate that the matter or thing is or is part of a work of artistic merit.

(g) Nobody shall be convicted of the offences in subsection (2)(c) who can demonstrate that the matter or thing

(i) has a genuine educational or scientific purpose; or
(ii) is or is part of a work of artistic merit,

and

(iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

(h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

(b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.

(c) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

FORFEITURE OF MATERIAL

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

ABSENCE OF DEFENCE

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

DUE DILIGENCE DEFENCE

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

DIRECTORS

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

DEFINITIONS

159(8) For purposes of this section, "sexually violent behaviour" includes

(i) sexual assault,

(ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

5.2 Section 160

Section 160, the forfeiture provision of the *Code*, received little comment either at the public hearings or in the briefs submitted to the Committee. Such comment as there was tended to be general in nature. Some groups thought that section 160 should be repealed because it amounted to a general power to censor. Other groups thought that it should be retained and, in fact, used more often than it is.

The Committee is of the view that section 160 should be retained, at least insofar as tier one and tier two materials are concerned. In other words, taking forfeiture proceedings against the material itself should continue to be an alternative to a criminal charge with respect to material involving children, material advocating or encouraging the sexual abuse of children, pornography produced in such a way as to cause physical harm and sexually aggressive and degrading pornography. It would not be an option with respect to material that is in tier three. The reason for this distinction is explained below.

There are three reasons why we think that a provision like section 160 should remain in the *Criminal Code*. The first is that it provides a speedy way of resolving the question of whether or not material is in fact prohibited. The second is that it allows for that question to be resolved in proceedings in which there is no risk of anyone being convicted of a criminal offence. The third is that it provides private citizens with a useful and effective alternative to a private prosecution in situations in which, for one reason or another, the government has refused to act.

The second and third of these reasons require some explanation. In cases where it is clear that the material in question is prohibited, the Committee is of the view that criminal charges should be laid as quickly as possible. However, we agree with the opinion expressed by Judge Borins in *Regina* v. *Nicols* that, in cases where it is difficult to know whether the material in question is prohibited, there is an element of unfairness in proceeding by way of criminal charges. In those cases, which the committee hopes would be few and far between under the regime it is proposing, section 160 proceedings would be appropriate.

Insofar as the third reason is concerned, our public hearings revealed that there was a great deal of dissatisfaction about the reluctance of law enforcement officials in some provinces to take action against material that some members of the public considered clearly to be obscene. In the Committee's view, a provision like section 160 should be available to private citizens so that they can act in situations where the government will not. We realize that a power such as this in the hands of private citizens is open to abuse. However, close scrutiny of the information upon oath which forms the basis of the application for a warrant to seize the material, should catch the obvious abuses. If it was deemed necessary, express provision could be made in the section for a power on the part of the Attorney General to stay proceedings in order to catch those abuses which surmounted this initial hurdle.

The Committee's reasoning on this point assumes that section 160, as it now reads, allows private citizens to initiate proceedings under it. As was noted in our discussion of the existing law, the courts appear to have accepted that it does. However, the point does not appear to have been argued and it may be advisable to make it clear that private citizens can invoke the section.

Two additional points about section 160 should be noted. The first is that, although the courts have accepted that the onus is on the Crown under section 160 to prove beyond a reasonable doubt that the material in question is obscene, the language of the provision suggests that the onus is on the other side to prove that it is not obscene. The Committee recommends that the section be amended to make it clear that the onus is on the Crown in such cases.

The second point relates to the use of juries in section 160 cases. At present, section 160 "show cause" hearings are heard by a judge alone. The Committee gave serious consideration to recommending that the party defending the material should be allowed to elect to have the case heard by a judge and jury. The rationale for such a recommendation would have been a desire to minimize the differences in the way in which criminal prosecutions (at least those commenced by indictment) and section 160 cases were handled. In the result, however, the Committee decided against making such a recommendation. Trial of section 160 cases by juries would make proceedings more lengthy and one of the main advantages of the section would be lost.

It will be recalled that the recommendation that section 160 be retained contained the proviso that its application should be limited to prohibited material. The reason for this is that, in the case of regulated material, the concern is with the circumstances of the sale or display, rather than with the material itself. Forfeiture proceedings in respect of such material would seem to make little sense.

Recommendation 8

Section 160 of the Code, allowing forfeiture proceedings to be brought, as an alternative to a criminal charge, should be retained in the Code but its application should be limited to tier one and tier two material.

Recommendation 9

To clarify the law on this point, section 160 should be amended to make it clear that the onus rests on the Crown under this section to prove beyond a reasonable doubt that the material comes within either tier one or tier two.

5.3 Section 161

Recommendation 10

Section 161 of the Code should be amended as follows:

> **161. Everyone who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may offend section 159(1) or section 159(2) of the Code is guilty of an indictable offence and is liable to imprisonment for two years.**

This recommendation really changes little from what the section now provides. At present, the reference is the person's apprehension that the material might be "obscene or a crime comic". The change merely reflects the repeal of section 159 and enactment of the new provisions.

5.4 Section 162

It will be recalled that section 162 deals with the publication of reports of judicial proceedings. The section contains a general prohibition against the publishing of "indecent matter or indecent medical, surgical or physiological details, being matter or details that, if published, are calculated to injure public morals", as well as a more specific prohibition relating to divorce, judicial separation and nullity proceedings. In respect of the latter kind of proceedings, it is made an offence to publish anything other than names and addresses, concise statements of the charges, defences, legal submissions, the judge's summing up, the jury's findings and the court's decision.

The Committee is of the view that section 162 should be repealed. It most certainly cannot be sustained on the basis of the need to protect public morals. That may have been an adequate rationale in 1926 when the British legislation upon which section 162 was based was enacted. It is not an adequate rationale today. Moreover, it is difficult to see why "indecent matter [and] indecent medical, surgical or physiological details" that find their way into judicial proceedings should be deserving of special treatment in the law.

To the extent that there may be a concern about the privacy and other interests of participants in judicial proceedings, including witnesses, it may be appropriate to empower the judge to make a specific order with respect to the non-publication of certain matters arising during those proceedings. A model for such a provision might well be section 467 of the *Criminal Code*, which empowers a judge to ban the publication of evidence taken at a preliminary hearing. If broader protection for those interests is thought to be necessary, consideration might be given to enacting a provision along the lines of section 246.6(4), which prohibits the publication of the evidence of the sexual activity of a complainant in a sexual assault case.

Whatever the form such a provision would take, its purpose would be to protect the interests of those involved in the judicial proceedings. The provision would not be based on a concern that the content, pornographic or otherwise, of the information conveyed might be harmful to those who read or see it. For this reason, the provision would not belong in the part of the *Criminal Code* that deals with pornography.

Recommendation 11

Section 162 of the Code should be repealed.

5.5 Section 164

Recommendation 12

Section 164 of the Code should be repealed and replaced by:

MAILING PORNOGRAPHIC MATERIAL

164(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

(a) depicts or describes a person or persons under the age of 18 years engaging in sexual conduct,

(b) advocates, encourages, condones, or presents as normal the sexual abuse of children

is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

(a) by virtue of its character gives reason to believe that actual physical harm was caused to the person or persons depicted, or

(b) depicts or describes:

(i) sexually violent behaviour,

(ii) bestiality,

(iii) incest, or

(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who makes use of the mails for the purpose of transmitting or delivering unsolicited visual pornographic material to members of the public is guilty af an offence punishable on summary conviction.

(4) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing mailed

(i) has and is being transmitted or delivered for a genuine educational or scientific purpose, or

(ii) is or is part of a work of artistic merit.

(5) It shall not be a defence to a charge under subsections (1) and (2) of this section that the accused is ignorant of the character of the matter or thing in respect of which the charge was laid.

(6) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, violent behaviour, incest, bestiality, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

The new section 164 incorporates the changes made to section 159 and covers all three tiers. As we consider the retailers of tier one and two material as the equals in the production, distribution chain to the makers, printers, publishers and distributors referred to in section 159 (1)(2) and 159 (2)(a), we have concluded that ignorance of content should similarly not constitute a defence (section 164(5)). Moreover, the same maximum penalty should apply as is prescribed by section 159 (1)(a) and (2)(a).

In tune with our general approach to tier two material we have included the defences of genuine educational and scientific purpose, and artistic merit in section 164(4). It will be noted that in respect of the former the defence relates to both the nature of the material and the purpose of its mailing.

We include an offence of mailing unsolicited visual pornographic material in section 164(3). This is in essence the equivalent of the display provisions in section 159(3). The definition of "visual pornographic" material in section 164(b) has been framed to include "sexually violent behaviour, bestiality, incest or necrophilia", as the offence should embrace not only those materials which fall within tier three, but also those tier two materials which were covered by the defences in section 164(4). Members of the public need, in our opinion, to be protected from unsolicited transmittal of this type of material as they do from tier three material.

5.6 Section 165

Section 165 of the present *Code* establishes the manner of proceeding under, and the penalties for breach of, the *Code* sections dealing with publication, distribution and sale, tied sales, judicial proceedings, theatrical performances and use of the mails. As the sections we recommend have specific penalties attached, repeal of this section is in order.

Recommendation 13

Section 165 of the Criminal Code should be repealed.

6. Offences Relating to Pornographic Performances

6.1 Section 163

We have adopted the same approach to the control of live pornographic performances that we have taken to the control of pornographic material. Hence, the provision which we recommend be included in the *Criminal Code* in the place of the existing section 163 is divided into three different offences, one to deal with live performances that fit the description of tier one material, (section 163(1)) one to deal with live performances that fit the description of tier two material, (section 163(2)) and one to deal with live performances that fit the description of tier three material, (section 163(3)).

It may be thought to be unnecessary in the case of live performances to include an offence for those performances that involve actual physical harm. For, if physical harm is, in fact, caused in such a performance, those responsible for such harm can be dealt with under the assault provisions of the *Criminal Code*. In our view, the justification for including this offence lies in the concern the Committee has that an accused may be able to argue under an assault charge that the performer consented. Given what will sometimes be a very unequal relationship between employer and employee and scant respect on the part of the former for the rights and sensitivities of the latter, this concern is not entirely fanciful. The provision also attempts to ensure that those who put on productions which involve tier two material, but which attract the defence of artistic merit limit themselves to simulation. Over and above the actual harm being caused is of course the odious message which is transmitted by such performances.

With respect to live performances that fit the description of tier two material, there is a defence of artistic merit in section 163(5). Because we are in the realm of public display, however, an accused would be obliged to show not only that the performance had artistic merit, but also that the performance took place in premises containing an adequate warning. Live performances that fit the description of tier three material would be permitted under this proposal, provided they took place behind an adequate warning (section 163(3)). By section 163(4) ignorance of the nature of the performance is no defence to charges under section 163(1) and (2).

We are well aware that these proposals would produce a significant change in the law in this area, since it would mean that "live sex" shows would no longer be criminalized. We did not feel, however, that a criminal prohibition against such shows could be justified under any of the rationales that we have given for the other *Criminal Code* prohibitions we have recommended. Nor, in our view, could any other convincing rationale be found. Given our decision that tier three material should not be proscribed, a prohibition against the equivalent kind of live performance would have to be justified on the basis that live performances have some special quality about them that sets them apart from magazines, books, films and videos. The Williams Committee concluded that the physical presence of those involved in the sexual activity gave live performances a special quality. As they put it in their report, that presence results in a relationship between actual people that gives rise to "the peculiar objectionableness that many find in the idea of the live sex show, and the sense that the kind of voyeurism involved is especially degrading to both audience and performers." On this basis, the Williams committee concluded that live shows featuring actual sexual activity should be prohibited.

The difficulty we have with this line of reasoning is that even if one accepts that the idea of live sex shows may be objectionable to many and that the shows themselves may be degrading to both the performers and the audience, these are inadequate reasons for prohibiting such shows. The fact that people object to a particular activity is, in and of itself, no reason for making it illegal. Neither is the fact that those involved in it, provided they are adults, are degraded (whatever that may mean) by virtue of their involvement.

The fact that "live sex" shows would no longer be prohibited would not, of course, mean that they would not be subject to any regulation at all. We have already recommended that provinces and municipalities should play a major role in the regulation of pornographic material that falls into tiers two and three. We make the same recommendation here with respect to live performances of a sexual character. Both the power to regulate local businesses and the power to zone can and should be used to good effect in this area.

Recommendation 14

Section 163 of the Code should be repealed and replaced by:

LIVE SHOWS

163 (1) Everyone who, being the owner, operator, lessee, or manager, agent or person in charge of a theatre of any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which

(a) involves actual physical harm being caused to a person participating in the performance, or

(b) represents:

- **(i) sexually violent behaviour;**
- **(ii) bestiality;**
- **(iii) incest; or**
- **(iv) necrophilia**

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents, or gives, or allows to be presented or given therein without appropriate warning a performance in which explicit sexual conduct is depicted is guilty of an offence punishable on summary conviction.

(4) It shall not be a defence to a charge under subsections (1) and (2) that the accused was ignorant of the character of the production.

(5) Nobody shall be convicted of the offence under subsection (2) (b) who can demonstrate that

(i) the performance is or is part of work of artistic merit; and

(ii) the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(6) For purposes of subsection 3 it shall be sufficient to establish that an appropriate warning was given that the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominant warning notice advising of the nature of the performance.

(7) For purposes of subsection 3 "explicit sexual conduct" includes vaginal, oral or anal intercourse, masturbation, lewd touching of the

breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 15

The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.

6.2 Section 170

Recommendation 16

Section 170 of the Criminal Code should be amended to add the following provision:

This section has no application to a theatre or other place licensed to present live shows

Section 170 penalizes nudity in a public place without lawful excuse. The purpose of this exemption is to ensure that live performances will be proceeded against under section 163 of the *Code*, rather than this provision. As we have seen in our analysis of the present *Criminal Code* provisions on pornography in Chapter 7 of Section II, section 170 has been held to be applicable to theatrical performances notwithstanding the existence of specific offences relating to theatrical performances in section 163. We are of the opinion that to leave it open to the Crown to proceed under section 170 would be to allow an unwarranted departure from the three tier structure which we have developed.

Footnotes

[1] See Law Reform Commission of Canada, *Limits of the Criminal Law, Obscenity: A Test Case*, Ottawa, 1975; Department of Justice, *The Criminal Law in Canadian Society*, Ottawa, 1982.

[2] *R. v. Keegstra*, November 5, 1984 [unreported] (Alta Queen's Bench).

[3] *Ibid*, at 22.

[4] *Ibid*.

[5] *R. v. National News*, 1957, 118 C.C.C. 152 (Ont. Ct. of Appeal).

Chapter 21

Canada Customs

Our recommendations are divided into two categories, legal and administrative.

1. Legal

Recommendation 17

> **The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into the list of goods prohibited entry into Canada by Schedule C of the Customs Tariff and incorporated by reference into the Customs Act.**

We are of the view that our description of proscribed pornographic material in the *Criminal Code* should be incorporated by reference in all other federal legislation which attempts to regulate such material. It will be essential to do so if we are to achieve the kind of concerted and consistent regulatory effort needed to deal with pornographic material. There must be a common understanding of what kind of material should be regulated and controlled.

As we have indicated in the course of our discussion of the Customs legislation in Section II, chapter 9, the existing qualitative words used to describe the character of what pornographic material is to be regulated by Customs, are "immoral or indecent". We want to be careful to point out (as we have in other areas), that while the incorporation of our *Criminal Code* recommendations concerning proscribed pornographic material into Customs legislation will more clearly define the material for those who are asked to classify it, our recommendations deal only with material that contains some kind of sexual activity. They do not extend to those materials which are, for example, violent and/or disgusting, but lacking in any depiction or description of sexual activity. The possibility exists that this kind of material is covered by the present description of "immoral or indecent" in *Tariff* item 99201-1. The short point is that the simple exchange of our criminal law recommendations with respect to pornographic material for the words of the present *Tariff* item, will leave out material that Canadians or their government or their regulators may want to prohibit from entry into Canada.

Recommendation 18

If, in administering the Customs Tariff, it becomes necessary for Customs to formulate descriptions of pornographic material more precisely than do our Criminal Code recommendations, Customs should put such formulations in the form of Regulations rather than internal policy guidelines or memoranda.

In order to better administer the *Tariff*, Customs may wish to formulate more precisely or more comprehensively descriptions of pornographic material. We do not think, however, that such formulation should be put in the form of policy guidelines or interpretive intra-departmental memoranda. We think, instead, that Customs should pass Regulations for posting at all regional offices. The Regulations should also be available to interested members of the public upon the payment of an appropriate fee. In our view, Regulations should be passed only after they have been published as proposals seeking public comment. This practice has been used to advantage by other regulators (notably the Canadian Radio-Television & Telecommunications Commission) as a useful vehicle to obtain public involvement and response.

Regulations can, of course, be amended if practice and experience requires. The fact that the contents of Regulations are public and easily accessible will help to ensure that interested members of the public are informed and appropriate pressure can be brought to amend the Regulations when necessary. The same advantages do not exist with respect to intra-departmental guidelines and memoranda.

Recommendation 19

The Criminal Code should be amended to provide that it be an offence to import into Canada pornographic material proscribed by the Criminal Code.

For the reasons that follow, we have concluded that it should be a criminal offence to import certain kinds of pornographic material. We point out that if our recommendations with respect to inclusion in the *Criminal Code* of various kinds of pornographic material are accepted, the offence of importing should extend only to that material should is proscribed, not the material that is regulated in terms of display and its availability to children.

Under the current regime, an importer of goods who is prepared to seek Customs clearance faces no risk if the goods are declared to be prohibited. The consequences of such a declaration are that the goods are returned to their source or are destroyed if abandoned by the importer.

It is only when an importer brings in goods which he fails to declare that a risk of criminal sanction arises under the *Customs Act* and the *Customs Tariff*.

As we have indicated in the chapters of this Report that describe the sources of pornographic material, it is clear that the vast majority of it comes from outside Canada. Under the present state of the criminal law, there is no real disincentive to the flow of material into Canada. It seems clear that the existing sanctions are, and will continue to be, inadequate to stop this flow.

The parallels between the pornography and the narcotics industries are compelling. The law has acted to attempt to address the problem of narcotics at the point where the material enters the country.[1] The sanction that the criminal law places on the act of importing narcotics has, in the opinion of many law enforcement officials, acted as a deterrent and has done much to stem the tide of narcotics. For some of the same reasons, we have considered the suggestion that the *Criminal Code* be amended to make it an offence to import the worst kinds of pornographic material into Canada.

The first concern that arises in making the importation of pornographic material an offence, is that by doing so we would be putting a premium on the material that is then produced in Canada. It would be a cruel irony if the result of creating the offence of importing pornographic material was to develop a domestic production industry. While we are sure that production would undoubtedly increase in Canada, we think that there are some factors which would confine that increase. Firstly, law enforcement authorities could anticipate the increase and tailor their efforts to respond to it. Pornographic material has caused sufficient concern within the country that producers cannot count on the apathy of either the public or law enforcement officials to insulate them from investigation and detention.

Secondly, the consumers of pornography are used to being able to acquire a product that is technically well produced. We assume that it would, therefore, take considerable investment to match the product that has traditionally been reaching the marketplace in Canada. That investment would, of course, be at risk upon detection.

Additional concerns arise when considering what defences could arise to a charge of importing. For example, should the mere fact of a Customs clearance be a complete defence?

On the basis of what we know of the operations of Canada Customs, it is clear that a huge volume of pornographic material goes undetected. We know that large shipments can be checked only randomly and that the illegal material could easily be secreted within a shipment of other goods. We also know that the largest portion of imported goods is cleared without any inspection whatsoever.

In these circumstances, we think that the simple fact of a Customs clearance should not be a complete defence to a charge of importing. We do think, however, that the fact of Customs clearance should be taken into consideration in order to determine whether the accused had the necessary guilty intent to commit the offence. For example, there is a great difference between the situation where Customs clearance is given under some mistake of failing to detect the material, and the situation where the material is specifically brought to the attention of a Customs officer and wrongly cleared. In the latter situation, the circumstances under which the clearance was sought and received would obviously be helpful in determining the intent of the accused.

Our criminal law provides that where there is a substantive offence, it will also be illegal to attempt to commit the substantive offence. This raises some further concerns about making importing pornography an offence. Should there be a conviction for attempting to import in those cases where a person declares pornographic material and the material is denied entry? Surely not. The attempt to commit the offence would, however, be complete if a person secreted pornographic material or attempted to enter the goods without proper disclosure.

Taking everything into consideration, we conclude that the *Criminal Code* should be amended by making it an offence to import proscribed pornographic material. It would be open to the Crown to proceed by indictment or summary conviction. The maximum penalty should be two years imprisonment.

Recommendation 20

> **Judges should be entitled to consider at the time of sentencing a person convicted of dealing in one manner or another with proscribed pornographic material that the person disclosed to law enforcement officers the source of the material in question.**

In our discussions with Customs and law enforcement officials, it became clear that information about the source of pornographic material is almost impossible to come by. Yet it is obvious that such information would considerably assist in the effort to control the importation and sale of proscribed or prohibited material. As a way around this difficulty, at least partially, it was suggested to us that the law should somehow oblige a person under investigation for dealing in one way or another with pornographic material to reveal the source of that material.

The objective of such an obligation would clearly be a desirable one. However, there is both a philosophical and a practical reason why, in our view, these suggestions cannot be acted upon. On the philosophical level, there is the concern that the imposition of such an obligation would conflict with the fundamental principle of our law, that persons cannot be compelled to make statements that might tend to incriminate them. If the source of the prohibited material was located in another country, identification of that source by either an accused or a convicted person would indicate that they had imported prohibited goods contrary to the *Customs Tariff* (or, if our third recommendation above were implemented, that they had imported prohibited material). While it is possible to provide that the information given could not be used in subsequent proceedings against the persons giving it, that would likely prove to be of little solace to them. On the basis of the information provided, the Crown might well be in a position to uncover other evidence that is admissible against them and convict them on that basis.

On the practical level, there is the obvious concern that the information given might be false or misleading. Or the person may genuinely not know or be able to identify the person from whom the material was obtained.

We believe that the only viable recommendation that we can make on this matter is that judges be encouraged to take into account at time of sentencing, the fact that the accused disclosed the source of the material. Prosecutors and judges alike would have to be careful that the accused did not mislead them, but if the information can be verified or if there is reason to believe that it is accurate, it seems to us appropriate that the accused should benefit to some extent from his willingness to disclose the information.

2. Administrative

The Customs Branch has a complex administrative responsibility. The volume of tariffs, procedures, clearances and sheer paper is enormous. The administration of Customs is further complicated by the fact that it is a national service in a huge country that depends heavily on trade. Canadians are among the most voracious consumers in the world and are proud of their reputation as a sophisticated trading nation. Our demand for goods is consistently high and with it comes corresponding demands on the Customs service.

We do not make these observations as an apology for Customs, but in order to indicate that by the nature of the function they have to perform, Customs is vulnerable to criticism. In one sense, Customs is something of an institutional scapegoat.

Our mandate has not been to conduct an exhaustive study into the administration of the Customs service. Certainly, we have not been able to do so. We have, however, had the chance to meet with Customs officials to ask specific questions about aspects of their service that relate to prohibited goods.

We hope that our suggestions are informed and will not be seen to be gratuitous. Most of our observations and recommendations arise from meeting with Customs officials and observing the process followed by Customs officers.

Recommendation 21

The federal government should give higher priority than it now does to the control of the importation of pornography.

In the discussion of the enforcement of Customs legislation, we noted our impression that the inability of Customs to stem the flow of pornography into Canada was due, in part, to the lack of political will. We were advised that greater emphasis has been given by the federal government to the enforcement of the rules and regulations that apply to automobiles and clothing than to the enforcement of Tariff Item 99201-1.

This ordering of priorities is, in our view, unacceptable. Surely it is more important to prevent the entry into Canada of a number of magazines that offend Tariff Item 99201-1 than it is to ensure that an article of clothing reveals its place of origin.

Ideally, the Committee would like to see additional staff taken on by Customs to improve the level of enforcement of Tariff Item 99201-1. Given the current government's program of restraint in government spending, that may not be realistic, however. If that is the case, then personnel and other resources that are now employed in other areas, should be transferred to those departments that have primary responsibility for the enforcement of Tariff Item 99201-1.

Ineffective enforcement of Customs legislation in this area is of particular concern, given that a very high percentage of the pornographic material available in Canada comes from other countries. Many of the people who appeared before us were clearly frustrated by the lack of success that Customs was, and is, having. The recommendation we make should assist in alleviating at least some of this frustration.

Recommendation 22

> **The basic 1977 policy guidelines on the interpretation of prohibited goods should be immediately revised to contain more precise and contemporary formulations of characteristics which must be present to make materials "immoral or indecent".**

The very language used in the current policy guidelines (which are reproduced in the text) indicates the need for reform. The terms presently used in the guidelines reflect a dated notion of the kind of pornographic material that is widely available for distribution. We are aware that the Customs Branch agrees that the guidelines should be reformed and is in the process of doing so.

It is convenient to repeat here the views we expressed earlier about the advantages of using Regulations to give contemporary meaning to statutory language. The publication of proposals prior to the passage of Regulations will undoubtedly allow Customs to benefit from the public's notion of what Canadians currently think should be prohibited as immoral or indecent.

Recommendation 23

> **The jurisdiction to clear film and video recordings for importation into Canada should remain with Canada Customs. The jurisdiction to classify film and video recordings for sale or rent or public showing should remain with the provincial film classification boards.**

Recommendation 24

> **Co-operation between Customs and provincial film classification boards should continue in order that the classification of film and video recordings can take place as part of a single, integrated administrative procedure.**

Recommendation 25

> **Film or video recordings referred by Customs to provincial classification boards should remain in the continuous control of both agencies until the classification and clearance process is complete.**

In Section II, Chapter 14, we have discussed the various reasons which led us to recommend that jurisdiction to classify film and video recordings should continue to reside with provincial film classification boards. Some of the reasons have to do with the distinctively Canadian issues of culture and language, and others have to do with the immediacy of a relatively local classification system, when compared with what would likely be seen as the remoteness of a national system.

We think that most Canadians want to be able to hold any classifier to account for the decisions that are made. The reasons a classifier may give are perhaps better appreciated when explained in the specific locality where a film or video recording is actually to be shown or sold.

We think the present system of administrative co-operation between Customs and provincial classification boards should be nurtured and continued, and that it serves a useful purpose for the viewing public, the distributors of film and video recordings and, indeed, for Customs and the classification boards.

In order to prevent the possibility of allowing the entire Customs inspection system to be frustrated by the unauthorized copying of material pending ultimate Customs clearance, we conclude that film and video recordings to be classified should remain in the control of Customs until the clearance process is complete.

Specifically we think that the practice followed in Québec of allowing an importer to have custody of the material for classification should be stopped.

Recommendation 26

> **The management information services of Customs should be upgraded to provide an adequate central data base and the ancillary systems necessary to capture, store and retrieve information relating to the importation of prohibited material into Canada.**

Recommendation 27

> **Customs should be adequately equipped to fulfill its responsibilities in contributing to the information flow required for an effective interface between the resources of Customs and law enforcement agencies.**

As we have indicated in the preceding text, the current information system used by Customs is woefully inadequate. The Customs inspection system is highly decentralized and the information gathered from the system is disparate. Customs lacks even an adequate central data base. The information that does exist is difficult to put into the system and time-consuming to retrieve. Commodity specialists and other Customs officers given the responsibility to clear goods, are daily being asked to make quick and consistent decisions to determine if goods are prohibited by the *Tariff*. At the moment, they are simply not equipped to efficiently do so.

The immediate consequence of this lack of information resources is delay and inconsistency. The ultimate consequence is the inability of Customs to contribute appropriately to the other highly integrated gathering systems being put in place by law enforcement agencies. If there is to be any really effective overall Customs enforcement in the area of prohibited goods, Customs must immediately acquire dedicated "on-line" information resources. Before Customs can be expected to give needed information to companion agencies such as the RCMP, it must be able to inform itself about its own operations.

Recommendation 28

> **Customs should investigate the practicality of charging appropriate fees for the filing and hearing of appeals from classification decisions.**

As one method of helping to finance the kind of information mechanization that Customs requires, fees could be charged for the filing and processing of appeals. We think the fees should be set at a level that realistically attempts to compensate Customs for the administrative costs it sustains as a result of processing appeals. We do not think that the level of fees should be so unreasonably high as to frustrate the bringing of appeals.

We have no adequate way of knowing the likely cost of collecting such administrative fees. It may be that the costs involved would make our recommendation counter-productive. We simply suggest that Customs investigate the possibility of recovering some of its administrative costs so that more resources could be dedicated to the capital expenditures necessary to better equip the Customs Branch and to perform some of its clerical functions.

Recommendation 29

> **Customs, as part of a combined project to be undertaken with the Department of Communications and the CRTC, should examine the Customs implications involved in trans-border telecommunication of pornographic material.**

None of the members of the Committee has a technical background and we are not equipped to assess the kind of sophisticated technological information that we received from time to time about trans-border telecommunications. We were told that the technology exists to transmit pornographic material by means of telecommunication so that pictorial material could, for example, be transmitted electronically from the United States and be reproduced in Canada. The best analogy we can think of is the telex equipment most people are familiar with.

We do not make this recommendation to promote speculation about state-of-the-art methods to transmit pornographic material, but rather to indicate that this technology appears to be the next generation to the well known telex and telecopier machines many people have in their offices. The transmission of information in the way that has been described could, of course, completely bypass the existing scheme of Customs inspection. One of the challenges Customs faces in the next decade will be to determine how to manage and control material transmitted by technology.

Footnotes

[1] Section 5 of the *Narcotic Control Act*, 1960-61, c.35, provides:

(1) Except as authorized by this *Act* or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years.

Chapter 22

Canada Post

Earlier, we reviewed the overlapping and, to some extent, competing jurisdictions of the Customs and Postal services. We have no desire to enter the controversy about what international mail Customs can or should inspect. In any event, the controversy would appear to have been resolved. The agreement that Customs may inspect mail weighing more than 30 grams is awaiting legislative confirmation when the proposed new *Customs Act* is reintroduced in Parliament.

Our recommendation is addressed to the level of co-operation that must necessarily exist between the two services and the RCMP if there is to be an effective overall effort to control prohibited goods sent to Canada by mail. As we have recorded earlier, Customs and the RCMP are exchanging information and now supply information to a common data bank. This quite recent development is really just an extension of the other formal arrangements that have been made with respect to a division of responsibility for investigation and enforcement under the Customs legislation. The relationship between the Customs Branch and the RCMP appears to be comprehensively structured and well managed.

The same cannot be said about the involvement of the Postal service. It appears to have adopted a completely passive role. No priority has been assigned to the investigation of the transport of pornographic material in either the domestic or international mail. It appears that the postal service has been content to allow Customs and the RCMP to assume complete investigatory and preventative roles. The best information that we have is that while the postal service is provided with available compiled data by the RCMP and Customs, the flow of information is entirely one way. This apparent disinterest seems to be unique to Canada. While we have no comprehensive knowledge of the subject, it appears that in both the United States and countries in the Commonwealth there is an integrated co-operative effort involving Customs, the Postal service and the appropriate law enforcement agencies.

Recommendation 30

The Postal service should assign policy and administrative priority to the effective control of distribution of pornographic material by mail. We further

recommend that the postal service actively participate with the RCMP and the Customs service in gathering and exchanging information and data in an effort to better co-ordinate effective investigation and enforcement techniques to control the distribution of pornographic material by mail.

Chapter 23

Broadcasting and Communications

Our recommendations relate to aspects of the policies and procedures followed by the CRTC and to initiatives which Canada should be taking nationally and internationally.

Recommendation 31

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into Regulations passed or to be passed by the CRTC pursuant to the Broadcasting Act with respect to all broadcast media.

We point out that we are referring in this recommendation, only to the pornographic material that is proscribed under tier 1 and tier 2 of our proposed *Criminal Code* amendments and not to the material that is simply limited by display.

This recommendation raises two points, one large and one small. The small point is this: at present, the Regulations for AM and FM Radio Broadcastings, and publicly broadcast television, prohibit the broadcast of "anything contrary to law" and any obscene language or pictorial presentation. Accordingly, the broadcast of any material that violates the *Criminal Code* would constitute a breach of the CRTC's Regulations and could lead to the Commission imposing sanctions. As we have already pointed out, the same prohibitions do not appear in the Pay Television Regulations. In our view, the prohibition must appear in these Regulations if the Commission is to be able to move against a licence in the event of a breach of the criminal law.

Perhaps the reason for the omission has to do with the fact that pay television is a limited specialized subscriber service. Or, perhaps the reason for the omission has a great deal to do with the confused state of Canada's obscenity laws. If it is the former, we can see no valid reason to allow the broadcast of any illegal material on any media. If it is the latter, we think our recommendations with respect to what material will be illegal under the *Code* will help to bring the necessary certainty to the law.

In any event, we are of the view that the pay television Regulations should be amended so as to conform with the Regulations that have been passed with respect to free public radio and television broadcasting.

In the result, pay television broadcasters would face precisely the same consequences as all public broadcasters face if they choose to broadcast illegal material.

The larger point that is raised by this recommendation is that if our proposed *Criminal Code* amendments to proscribe pornographic material are incorporated by reference into the existing broadcast Regulations, the utility of the existing Regulations prohibiting obscene or indecent language or pictorial representation will have to be re-examined. Our recommendations covering proscribed pornographic material apply to material that depicts some kind of sexual activity. Material that is violent or disgusting but which has no sexual aspect to it, is not proscribed by our recommendations. If this material is to be prohibited from broadcast, the Regulations to the Broadcasting Act will have to be appropriately redrawn.

Recommendation 32

> **Canada should take the initiative to immediately open discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.**

It would be entirely inconsistent for Canada to regulate pornographic and/or abusive programming domestically and do nothing about the regulation of such programs when they are received in Canada, but originate in another country. We can understand the important principle of national sovereignty and we are convinced, therefore, that any such international regulation will be achieved only as a result of agreement between sovereign countries. The most pressing need is for discussions to begin with the United States. Both countries have experience with comprehensive domestic regulation and both countries must surely understand the urgency for joint action to regulate pornographic program content. Both countries are members of INTELSAT, the global satellite system. We hope that Canada and the United States will jointly sponsor discussion of this issue in that international forum.

Recommendation 33

> **The CRTC should conduct the appropriate research into and promote appropriate public discussion about technology capable of scrambling and descrambling satellite signals, in order that there can be a measure of practical control over the transmission and reception of satellite signals.**

We hope that the international regulation we speak of in our Recommendation 32 will not be too long in coming. However, the issue of the reception of satellite signals that contain pornographic material is too urgent to remain untreated pending an international agreement on regulation. In the meantime, we agree with the private views expressed by the Chairman of the CRTC and quoted earlier. We hope the CRTC will help to facilitate necessary further technological research in this area. The Commission's mandate under the *Broadcasting Act* includes the following power:

> 18.(1) The Executive Committee may undertake, sponsor, promote or assist in research relating to any aspect of broadcasting and in so doing it shall, wherever appropriate, utilize technical, economic and statistical

information and advice from the Corporation or departments or agencies of the Government of Canada.

If it is determined that there is an affordable technological method whereby those who own satellite antennas can prevent the reception of unwanted signals, we are sure the Commission will make that fact well known. We have no doubt, based on the submissions that have been made to us, that a large number of Canadian parents hope that such technology will be available to protect their children from unwanted and intrusive pornographic broadcasting.

Recommendation 34

Upon the issuing or renewal of a broadcast licence, a licensee should be required to post a bond in an appropriate amount to ensure compliance with the Regulations and conditions of licence relating to program content. In the event that a complaint about program content is upheld by the CRTC, the Commission should have the discretion to compensate the complainant for the costs incurred in presenting the complaint, such costs to be paid the licensee and secured by the aforesaid bond.

As we have mentioned, the CRTC cannot and does not monitor all programs either by way of pre-clearance or by way of on-air observation. Concerned members of the public may, therefore, decide that it is in the public interest to have programs monitored. Such an effort may well be required to properly document a complaint to the Commission, particularly if the complaint relates to some systematic behaviour by a licensee.

In our view, a successful complainant should be compensated (not rewarded, but compensated) for the reasonable costs involved in accumulating and presenting the necessary evidence. In addition we think that the reasonable hearing costs of the successful complainant should be paid.

We do not think that these costs should be paid by the public.

We think that the licensee against whom the complaint has succeeded should be obliged to pay the costs of the complaint.

In order to make the proposal work, the Commission must be given the jurisdiction it now lacks, both to award costs and determine their amount. Such jurisdiction can only arise upon amendments being made to the appropriate legislation.

As security for the payment of costs, all licensees could be required by the CRTC to post a bond or equivalent security or other financial instrument at the time a licence is issued or renewed. The posting of such an instrument would prevent the penalty that would clearly arise if a licensee was required to post a cash amount.

In any civil litigation the successful party is entitled to some compensation for costs. In quasi-judicial situations a system of compensation for costs is also well-known. Although the analogy is not perfect, human rights commissions in

Canada have the power to award costs. The various commissions actually provide the facilities and the staff for a complainant to pursue a remedy. If the complainant makes use of these facilities, costs will not be awarded to a successful complainant. If, however, the complainant obtains private counsel, costs may be awarded in the discretion of the tribunal. If the commission is of the view that the complaint was frivolous, it can award costs to a respondent.

In the case of complaints to the CRTC, it might well be argued that the Commission should have the jurisdiction to award costs to a licensee who has been successful in defending a complaint. However, it must be remembered that the Commission has the discretion to decide whether a complaint will proceed and whether there should even be a hearing. In these circumstances, we think that it is sufficient to give the Commission the power and the discretion to award costs only to the complainant.

Chapter 24

Human Rights Approach

1. Introduction

There was considerable interest expressed at the Committee's hearings in treating pornography as a human rights issue. Proponents of this approach did not, for the most part, make detailed proposals about how this might be accomplished in the Canadian context. Their submissions, however, stressed a number of interrelated themes.

The first such theme emerges from the endorsement of the concept of pornography as defined by Helen Longino, Andrea Dworkin and others. Pornography is seen as involving, and may indeed inspire, the hatred of women. It is a powerful part of society's repression of women. As such, it is seen as an evil which limits the full human rights and dignity of women and, correspondingly, as an evil most appropriately attacked by means of the legislation already existing in our society to further human rights and dignity. Hence the call to use human rights legislation, and the enforcement mechanisms of human rights commissions, to attack pornography.

Proponents of the human rights approach cite as the best example of use of this method the by-law drafted by Andrea Dworkin and Catharine MacKinnon. Proposed for the City of Minneapolis and later enacted in Indianapolis, this by-law has a number of features which bear examination.

The by-law explicitly states that pornography is a form of discrimination on the basis of sex. The rationale for this characterization is spelled out in the by-law: pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women; the bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment and almost all other areas.[1] The framers of the by-law, Andrea Dworkin and Catharine MacKinnon, maintain in fact that the influence of pornography over the ages on the men who rule societies has contributed to the development of misogynist (women-hating) social institutions. Only now, however, that changes in technology and the market have made pornography widespread have we begun to understand its impact.[2]

The Indianapolis by-law articulates one of the city's objectives as "to prevent and prohibit all discriminatory practices of sexual subordination or inequality through pornography".[3] The by-law is specifically directed at three distinct activities: trafficking in pornography, coercion into pornographic performances, and forcing pornography on a person.

With regard to trafficking, the by-law provides that the production, sale, exhibit or distribution of pornography is discrimination against women by means of trafficking in pornography, and gives to any woman a cause of action under the by-law "as a woman acting against the subordination of women." Any man or transsexual who alleges injury by pornography in the way women are injured by it is also given a cause of action.[4] The formation of private clubs or associations for purposes of trafficking in pornography is illegal.[5] This cause of action is the most far-reaching in the by-law. The position is that the public availability of the pornography, as defined in the ordinance, is in and of itself a violation of women's rights to equal personhood and citizenship. It would seem that a remedy would be available on the mere showing that the pornography is within the definition in the by-law, without a further showing of damage personal to the complainant.

Any person who is coerced, intimidated or fraudulently induced into performing in pornography is given a cause of action against the maker, seller, exhibitor, or distributor of the pornography for damages, and for the elimination of the products of the performance from public view.[6]

Any person, who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action against the perpetrator or institution.[7]

In addition to these three provisions, the by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography a cause of action for damages against the perpetrator, maker, distributor, seller, and exhibitor, and for an injunction against further exhibition, distribution or sale of the specific pornography.[8]

The by-law contemplates that the person may assert these causes of action in either of two forums. The municipal Office of Equal Opportunity is empowered to receive a complaint. Once the complaint has been filed, the by-law provides for an investigation, and for an informal conference in an effort to eliminate such practice if there is reasonable ground to believe that a breach has occurred. If the complaint is not resolved informally, the Complaint Adjudication Committee may hold a public hearing. The board may seek judicial enforcement of its decision if a respondent fails to comply with it. Recourse to the courts also arises in another way. The complainant may seek temporary equitable relief through the courts upon the filing of a complaint.

2. The Canadian Context

It is worthy of note that some of those who supported the idea of a civil remedy for pornography appeared to do so as much for procedural reasons as for the substantive ones on which the Indianapolis by-law is based. The Committee received complaints that police or Crown Attorneys were refusing, for various reasons, to bring charges in connection with material considered obscene by citizens. The Crown's decisions not to prosecute are difficult to circumvent. They cannot be reviewed by a court, and may for practical purposes be difficult to reverse by means of political pressure.

There are difficulties in bringing private prosecutions. They may be stayed by the Crown with no opportunity for the person bringing the prosecution to have the Crown's decision to enter a stay legally reviewed. Other cases may require investigative and financial resources beyond the reach of many. The burden on the private prosecutor is the same as the burden imposed upon the Crown, proof of guilt beyond a reasonable doubt.

In a civil action, proceedings are not dependent on the Crown's volition: the parties themselves have control of the matter. The standard of proof is not nearly so high. Instead of proof being established beyond a reasonable doubt, the case need be proven only on a balance of probabilities. It must be acknowledged, however, that those who proceed with civil actions face the need to pay legal bills, not only for their own counsel, but also for the opposing party should the action be unsuccessful. However, it is thought that involvement of human rights commissions where complainants are not required to pay legal costs, may alleviate that particular disadvantage.

Evaluating the usefulness of the civil action approach in the Canadian context thus requires a consideration not only of the important substantive issue raised by its proponents, but also of the features which make it attractive from a procedural point of view.

Before assessing the civil action option from both of these points of view, we review briefly the availability in Canadian law of recourse like that set out in the Indianapolis by-law.

2.1 Canadian Law

In Canadian law, recourse for some of the harms attacked in the Indianapolis by-law may be available, but with two important differences from the by-law. Firstly, the recourse may be somewhat indirect, compared with the straightforward spelling out of remedies in the by-law. Secondly, problems of proof of harm will in many cases be more difficult in Canadian law than is contemplated in the by-law. Some examples are outlined here.

Take, for instance, the relief conferred by the by-law for someone coerced, intimidated or fraudulently induced into performing in pornography. In

Canadian law, it may well be possible for someone in this position to sue for damages for fraudulent misrepresentation, or for defamation. In an appropriate case, the court may be prepared to grant an injunction to stop the publication or distribution of the material complained of. Depending on the circumstances, criminal charges may be brought against the person wrongfully bringing about the participation in pornography.

The Indianapolis by-law, however, contains a number of stipulations withdrawing certain defences to an action for wrongfully involving a person in the production of pornography. Among the possible defences withdrawn are: that the person actually consented to a use of the performance that is changed into pornography; that the person knew that the purpose of the acts or events in question was to make pornography; that the person demonstrated no resistance or appeared to co-operate actively in the photographic sessions or in the sexual events that produced the pornography; and that the person signed a contract, or made statements affirming a willingness to co-operate in the production of pornography.[9] Doubtless it is the withdrawal of these potential defences which makes this aspect of the by-law attractive to its proponents, for each of these defences is open to abuse by an unscrupulous person who is truly manipulating another into appearing in pornography.

The Indianapolis by-law confers on any person who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography, a cause of action for damages against its perpetrator, maker, distributor, seller and exhibitor. It is not unlikely that, even without such a by-law, this type of action might succeed if brought in Canada. The person suffering such damage could bring a civil action. Depending on the facts of the case, the victim could allege either that the infliction of harm was intentional, or that it resulted from negligence on the part of the party being sued. The potential of bringing this type of action was raised during the public hearings. It was pointed out that negligence concepts are now being extended to situations where, for example, a tavern keeper who knew a customer was too drunk for safety but allowed him to depart the premises was held responsible for damages arising when the customer was hit by a car on the side of the road.[10]

The difficulties involved in pursuing an action for damages for harm caused by pornography would be primarily ones of causation and proof. It would have to be established that the injury was caused by the pornography. We have been told during our hearings of two kinds of cases where this might be possible. Workers from shelters for battered women report being told by some clients that their male friends or spouses required them to participate in acts of violence imitating images seen by the men in pornographic magazines. Some cases of violent crimes against women where the perpetrator was found to have a supply of violent pornography were drawn to our attention. In either type of case, assuming that the facts could be proved, it may be possible to bring this type of action.

Of course, a typical defence might allege that a different cause altogether was responsible for the actions; in the case of a psychopathic-type murder, for example, an accused who had manufactured pornography would likely advance the murderer's mental condition as the direct cause of the crime. The negligence action might face another hurdle, that of establishing that in law, the victim or potential victim of pornography should have been in the contemplation of the defendant. Establishing such a proposition might well involve canvassing in court the substantial experimental literature on the links between pornography and violence discussed in Section I, chapter 6 of this Part.[11]

All in all, however, it can be said that there is little in the Indianapolis by-law itself which would eliminate problems like the foregoing in an action brought pursuant to the by-law. To that extent, it may be said that the position in Canadian law is comparable to that explicitly provided for on this point by the by-law.

A provision of the by-law which has caused great interest in Canada is the action for damages and injunctive relief which may be brought by any woman complaining of trafficking in pornography. The proceeding does not require a showing of actual harm. Upon proof that the material is within the definition of pornography, it is taken that the harm is made out. Thus, it can be said that the by-law confers a private cause of action to restrain or redress a public wrong. The possibility of using human rights procedures in this fashion has prompted considerable interest in Canada.

It should be pointed out at this point that using the private action to redress a public wrong has not, until now, been a prominent feature of Canadian law. It is the Attorney General who must ordinarily sue to redress a public wrong. An individual who seeks to act in this fashion must secure the Attorney General's permission so to proceed, and the Attorney General's decision to grant or withhold such permission will not be reviewed by the courts.[12] Only if the individual has suffered some personal harm above that which has been sustained by members of the public generally can he or she proceed with a private action without official permission.

In fact, it is rare that even the Attorney General will proceed against a public wrong by way of a court action. Ordinarily, the recourse for public wrongs is by way of the criminal law, or a proceeding under the appropriate regulatory statute.

We think that a lot of the interest in the Indianapolis by-law approach really derives from Canadians' dissatisfaction with the administration of the criminal law relating to pornography. The ability of any private citizen to set in motion the legal process was frequently mentioned as an attractive feature of the by-law approach. To the extent that deficiencies in the criminal law, be it administration or substance, have prompted the recommendation to emulate the Indianapolis approach, we prefer to address directly the deficiencies in the criminal law rather than create a new form of civil action to redress a public wrong.

It must be said, however, that not all of the interest in the by-law approach originates with complaints about an unresponsive criminal justice system. As a matter of substance and principle, many proponents of the by-law approach find attractive the argument that pornography is a form of discrimination against women. The degradation of pornography is seen as the kind of affront to human dignity which is properly the subject matter of a human rights complaint. On principle, then, it is argued that the appropriate authority to deal with pornography is that having jurisdiction over human rights. Incidentally, it is noted that human rights enforcement procedures contain the attractive feature of being relatively open to all and inexpensive for the individual.

It is worthwhile to note at this juncture that human rights authorities in Canada are already, to a certain extent, dealing with pornography-related complaints, in ways similar to those contemplated by the Indianapolis by-law.

The by-law, for example, provides that any person who has pornography forced on him or her in any place of employment, in education, in a home or in any public place has a cause of action in court, or before the human rights authorities, against the perpetrator or institution. The complaints of unwilling exposure to pornography in employment, education or a public place may find redress under existing Canadian human rights codes, as we discuss in Section II, Chapter 13.

The decision of the Board of Inquiry in the *Red Eye* case, which we discuss in Chapter 13, and the Saskatchewan legislation under which it was made, are significant for a number of reasons. As the Board itself points out, there is no need under the *Human Rights Code* provision to apply the "community standards" test of obscenity.[13] Nor is there any necessity to demonstrate that the person alleged to have violated the section had an intent to belittle or offend. In these two important respects, the burden facing a complainant is less under the human rights provision than it would be under the *Criminal Code*. The decision itself is significant because of its clear recognition that material like that at issue in the case should be seen as violating the equality rights of women guaranteed by *Charter of Rights*. It is an important step in the development of women's legal and constitutional position to have the equality guarantees recognized as being of equivalent constitutional force to the long recognized freedom of expression guarantee.

An appeal of the *Red Eye* decision has been launched. Whatever may be its outcome, a very useful way of approaching the issue of pornography has now been put on the public agenda. There may be some cause to expect that the constitutional validity of the Saskatchewan provision may be upheld by the Court. Mr. Justice Quigley of the Alberta Court of Queen's Bench ruled in *R.* v. *Keegstra* that in assessing the validity of s. 281.2 of the *Criminal Code* (dealing with so-called hate propaganda), the Court should consider not only the guarantee of freedom of expression in paragraph 2(b) of the *Charter* but also the guarantee of equality conferred by section 15 and the protection of multicultural rights conferred by section 27.[14] This is the same basic approach as that taken by the Board of Inquiry. Should this approach be followed by the Saskatchewan Court, the Board's decision may well be upheld.

In light of the position taken by the Court in *Keegstra*, there is some reason, indeed, to hope that a human rights statute like the Saskatchewan one will not suffer, in Canadian constitutional law, the same fate as did the Indianapolis by-law in the United States District Court. In a decision rendered in November, 1984, Judge Sarah Evans Barker declared the Indianapolis by-law to be invalid.[15] Among the major reasons for the decision was the position in American constitutional law that only "obscene" speech falls outside the protection for freedom of expression conferred by the First Amendment. Where laws impinge on speech that is not obscene, the state must show that they serve a compelling state interest, which is equivalent to the interest served by the First Amendment. Otherwise, the law will be unconstitutional.

Judge Barker held that the type of images prohibited in the Indianapolis by-law went beyond the legal definition of obscenity, a concept that is founded on the ideas of sexual prurience. In justification of the incursions into the area of so-called "protected speech", the city argued that the by-law served the compelling interest of protecting women from discrimination. This argument was rejected, largely on the basis of the moderate level of protection which has traditionally been afforded in American constitutional law against gender-based distinctions in law.

In Canadian constitutional law, we suggest, the *Charter of Rights* makes it clear in sections 15 and 28 that equality of women is a strongly protected value. Mr. Justice Quigley's analysis on this point, focusing on section 15 as a counterbalance to section 2, is, in our view, to be preferred in the Canadian context to the reasoning of Judge Barker.

This Committee was urged to recommend that provisions along the lines of the Saskatchewan hate literature provision be included in other Canadian human rights codes. We have considered the recommendation carefully, because we find attractive the rationale underlying the Saskatchewan decision. Pornography is, to our minds, an offence against human dignity and the guarantee of equality.

We have reservations, however, about the appropriateness of including a remedy aimed specifically at pornography solely within the jurisdiction of human rights commissions. These reservations stem in large part from our concerns about the nature of the commissions' process.

Typically, the receipt of a complaint initiates a process of investigation by a Commission. Most human rights commissions have a statutory obligation to attempt conciliation of a complaint before proceeding to the stage of a formal hearing. Until the complaint reaches a formal hearing stage, it can be expected that there will be little or no publicity from the commission about the issues or the progress of the case, since the investigation and conciliation phases are characterized by obligations of confidentiality. Often, the investigation and conciliation phase will be long. The *Red Eye* complaint, for example, was initiated in July of 1980. It was not until September, 1981 that the Board of Inquiry which would hear the complaint was named. The Board's decision emerged in March, 1984. The offending issues of the *Red Eye* had been published in 1979 and 1981. If the commission takes the view that the complaint should not lead to a public hearing, the complainant has limited recourse.

These disadvantages in the human rights procedure may well be balanced against its perceived advantages to the complainant, namely, that the commission bears the cost of the proceedings, and that anyone by making a complaint can oblige the commission to take some sort of action. One must also bear in mind, however, the negative aspects of even these perceived procedural advantages. Human rights commissions often experience difficulty in receiving enough funding to meet the demands placed upon them. In our view, one must consider carefully the financial implications of adding to commission jurisdiction a ground of complaint that may produce substantial numbers of new cases. Not only the ability to service the new caseload, but also the possible jeopardy to the commission's ability to meet existing demands upon it should be considered.

Given the interest in this issue and this remedy shown in our public hearings, the volume of material which is felt to be offensive, the relative ease of launching a complaint and the dissatisfaction with the responsiveness of existing enforcement authorities, we predict that there may be frequent resort to the human rights jurisdiction. The influx of new cases could have quite serious implications for commission funding. Unfortunately, the current climate of fiscal restraint in government circles has affected human rights commissions and other social agencies. One has little cause to hope that even a wave of anti-pornography popularity could provide enough new revenue to allow both the new and existing caseload to be serviced.

A further difficulty with the commission process has a serious bearing on the suitability of a commission to handle pornography complaints. Human rights commissions cannot give interim relief. They could not, for example, prevent the distribution of a particular publication pending resolution of a complaint, or take other similar steps to meet a crisis in the short-term period while a complaint was being processed. Much pornography about which persons will likely complain is contained in magazines with monthly issues. Thus an offending issue could be widely distributed, to the considerable enrichment of its publisher and wholesaler, long before a resolution of the complaint had been effected. By the time the remedy had been decided upon, the consumers of the original material could well have forgotten it, so that any retraction or apology would be almost totally meaningless. The court's process, on the other hand, offers the possibility that effective pre-trial measures would be available in a proper case, to take the material out of circulation immediately.

Given these concerns, we refrain from urging that provisions like subsection 14(1) of the Saskatchewan *Code* be inserted into all human rights legislation. We do, however, believe that it would be most beneficial for human rights commissions to explore vigorously the application of their existing legislation and jurisprudence to pornography issues. The application of the existing employment jurisprudence to control the presence of pornography in the workplace has already been mentioned. So, too, has the need to develop the same kind of approach in the area of services and facilities. In our view, it is important that commissions become active in putting issues concerning pornography on their existing agendas, but we are not confident that they will be able to handle a large number of complaints basically unrelated to their traditional areas of endeavour. The requirement of handling complaints arising from the large numbers of periodicals with pornographic content, or which people think have pornographic content, would, in our view, seriously overbalance commissions without producing much useful or timely resolution of issues.

Recommendation 35

> **Human rights commissions should vigorously explore the application of their existing legislation and jurisprudence on pornography issues, including exposure to pornography in the workplace, stores and other facilities. However, we do not recommend that a separate pornography-related offence be added to human rights codes at this time.**

We believe that a good alternative to the use of human rights commissions as adjudicators of pornography issues can be brought into existence reasonably expeditiously. We recommend that jurisdictions enact by legislation a civil cause of action focusing on the violation of civil rights inherent in pornography. There now exists in Canadian law at least a partial model for such a cause of action. The *Civil Rights Protection Act, 1981*,[16] of British Columbia, creates a class of "prohibited acts". In subsection 1(1) of the *Act*, "prohibited act" is defined as "any conduct or communication by a person that has as its purpose interference with the civil rights of a person or class of persons by promoting:

> (a) hatred or contempt of a person or class of persons, or
>
> (b) the superiority or inferiority of a person or class of persons in comparison with another or others,
>
> on the basis of colour, race, ethnic origin or place of origin."

The *Act* provides in subsection 1(2) that a prohibited act is a civil wrong (tort) that can be the subject of a claim by a person or class of persons, without the necessity of the complainant proving that any actual damage was suffered. Section 3 of the *Act* allows the Court to award damages and an injunction in appropriate cases.

It may actually be possible to use this act now as the basis for an action against pornography featuring demeaning racial stereotypes. Examples of such material were presented to the Committee during the public hearings; it is certainly within the bounds of possibility that it could be held to promote hatred or contempt of a person or class of persons or the inferiority of that person or persons in comparison with another or others.

Recommendation 36

> **Legislation along the lines of the Civil Rights Protection Act, 1981 of British Columbia should be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography.**

We are not going to offer here an elaborate draft statute, because we are aware that there may be many ways of effecting this basic purpose. One simple way would be to add "sex" or "gender" to the definition of "prohibited act" in subsection 1(1) of the *Act*. Another proposal that has been made is to add to the *Act*, a definition of pornography which is very close to that found in the Indianapolis by-law,[17] but it may be that others favour a less particular statute.

However the drafting may be done, we are convinced that to enact this sort of legislation would confer a cause of action which has many of the attractive features of the human rights approach. It is an action which does not need the approval of the Crown or Attorney General, and will be controlled by the party suing rather than a human rights commission. It will be conducted in a public forum. It will probably take no longer to prosecute than a human rights complaint, and could take less time. The cause of action reaches the nub of what is offensive about pornography, and the remedies seem flexible. This type of action does not foreclose the prospect of bringing an action for intentional harm or negligence against the purveyor of pornography when a link between pornography and actual harm can be established.

It seems that the most unattractive feature of the *Civil Rights Protection Act* approach is that the costs of the action must be borne by the party and not by the state, as would be the case with a criminal prosecution or a human rights complaint. Individuals confronting a pornography distributor with substantial resources might well be deterred by such a prospect, particularly when it is remembered that a successful defendant might recover a large part of its legal costs from an unsuccessful plaintiff.

In our view, however, this cost consideration should not overbear the recommendation to institute this type of action. The "class action" feature gives some useful possibility of spreading the costs among numbers of persons with similar interests. The availability of injunctive relief means that the object of the lawsuit — restriction of the circulation of a particular periodical, for example — may be achieved without protracted proceedings. Alternatively, the prospect of such relief being obtained might encourage settlements. Negotiations for such settlements would be under the control of the plaintiffs, rather than the human rights commission, and the results of such settlements could be made public so as to serve as a deterrent for other pornographers. Although, then, there are some cost disadvantages in the private action method, we think that on balance this is a desirable option.

We note that the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society proposed in its 1984 report *Equality Now!* that civil actions against discriminators be permitted as an alternative to human rights proceedings.[18] In our view, even if the legislatures should decide that human rights commissions should have an explicit 'pornography' jurisdiction like that in subsection 14(1) of the *Saskatchewan Human Rights Code*, the civil action described above should be available as an alternative. That will ensure that persons or groups with the resources and the inclination to pursue it will have a real choice of forum.

Recommendation 37

> **Even if legislatures decide to include in human rights codes a specific pornography-related provision, we recommend that the civil cause of action described in Recommendation 36 be provided as an alternative.**

Footnotes

[1] An ordinance of the City of Minneapolis Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights, Section 1 (amending Section 139.10 of the ordinance).

[2] Memorandum to Minneapolis City Council from Catharine A. MacKinnon and Andrea Dworkin Re Proposed Ordinance on Pornography, December 26, 1983.

[3] City — County General Ordinance No. 24, 1984, Section 1, which amends section 16 of the Code of Indianapolis and Marion County. See, in particular, the new s. 16-1(8). (Hereinafter referred to as Indianapolis By-law.)

[4] Indianapolis By-Law, section 1; see the new s. 16(4)(C).

[5] Indianapolis By-Law, section 1; see the new s. 16(4)(B).

[6] Indianapolis By-Law, section 1; see the new s. 16(5).

[7] Indianapolis By-Law, section 1; see the new s. 16(6).

[8] Indianapolis By-Law, section 1; see the new s. 16(7).

[9] Indianapolis By-Law, section 1; see the new s. 16(5)(A).

[10] *Jordan House* v. *Menow and Honsberger* (1973), 38 D.L.R. (3d) 105 (S.C.C.).

[11] Several actions have been brought in the United States by persons seeking to hold a broadcaster responsible in damages for harmful results of actions allegedly inspired by the broadcast. In *Weirum* v. *RKO General, Inc.* 15 Cal.3d 40 (1975), the California Supreme Court upheld a jury finding that a Los Angeles rock radio station was liable for the wrongful death of a motorist killed by two teenagers participating in a contest sponsored by the station. In *Olivia N.* v. *National Broadcasting Co.*, 126 Cal.App.3d 488 (1981) the California Court of Appeals upheld dismissal of a suit on behalf of a young girl who had been raped with a plunger by a group of youngsters emulating a scene shown in a television program. The parents of a 13 year old who accidently hanged himself while trying a stunt he had seen on the Johnny Carson show failed to recover damages in *DeFilippo et al* v. *National Broadcasting Co., Inc. et al.*, 446 A.2d 1036 (1982, Supreme Court of Rhode Island). In all of these cases, the powerful First Amendment protection of freedom of expression caused the court to apply the standard of whether the material had "incited" the conduct, rather than whether the broadcaster had been reckless or negligent.

[12] *Gouriet* v. *A.-G.*, [1978] A.C. 435 (H. L.).

[13] *Saskatchewan Human Rights Commission* v. *The Engineering Student's Society, University of Saskatchewan et al.* 7 Mar. 1984 unreported (*Red Eye Decision*) at 42.

[14] *R.* v. *Keegstra* 5 Nov. 1984 (Red Deer) unreported (pretrial hearing) at 20-23.

[15] *American Booksellers Association Inc., et al.* v. *Hudnut et al.*, No. IP 84-791C (Dist. Indiana Nov. 19, 1984). Judgment of Judge Sarah Evans Barker.

[16] S.B.C. 1981, c.12.

[17] Proposed by the Women's Committee of the Faculty of Law, University of British Columbia.

[18] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!* (1984, Supply and Services Canada, Ottawa) at 77.

Chapter 25

Hate Literature

We have discussed in the previous chapter the proposals we received that a remedy against pornography be provided by way of human rights legislation, as is now the case in the province of Saskatchewan. The basis of this thinking is the belief that pornography inhibits the equality of women, and their access to opportunities in economic and political spheres, by inculcating in society the idea of women's subordination. Inherent in the idea of pornography as a human rights issue is the idea that pornography causes, or at least reflects, a societal tendency to hate women. The belief that pornography and the misogyny of society are closely inter-related has given rise to the argument that pornography is hate literature against women. Some are sure that this form of hate literature can best be dealt with by means of human rights commissions. Others advocate stronger measures, namely the amendment of the hate message provisions of the *Criminal Code* so as to include protection for groups characterized by sex or gender.

The provision at the focus of these submissions is section 281.2 of the *Criminal Code:*

> (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for two years; or
>
> (b) an offence punishable on summary conviction.
>
> (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
>
> (a) an indictable offence and is liable to imprisonment for two years; or
>
> (b) an offence punishable on summary conviction.

Subsection (2) of this provision has been most particularly considered applicable to pornography. In section 281.2, and the related section 281.1 dealing with the advocacy or promotion of genocide, "identifiable group" is defined as "any section of the public distinguished by colour, race, religion or ethnic origin".[1] Those who say that this section should be amended to deal with pornography propose that "sex" be added to this list.

Section 281.2 was the subject of comment by the Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society in its 1984 report, *Equality Now!*. The Committee recommended that subsection 281.2(2) be amended so that it is no longer necessary to show that an accused specifically intended to promote hatred.[2] This recommendation was accepted by then Justice Minister MacGuigan in June, 1984. He announced that the word 'wilfully' would be removed from subsection 281.2(2).[3] Most of the groups who addressed this issue in our hearings also favoured the removal of this requirement for specific intent.

Another recommendation of the Special Parliamentary Committee dealt with the defences available to a charge under subsection 281.2(2). At present, section 281.2(3) of the *Code* provides:

> (3) No person shall be convicted of an offence under subsection (2)
>
> (a) if he establishes that the statements communicated were true;
>
> (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject;
>
> (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
>
> (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

The Special Parliamentary Committee pointed out that it is now not clear whether the burden of raising these defences is on the accused at all times, or whether the Crown must discharge the burden of disproving a defence. Accordingly, it recommended that the *Code* be amended to make it clear that the burden of raising special defences is on the accused. The Committee rejected proposals that the defences set out in paragraphs (b), (c) and (d) of subsection 281.2(3) be removed.[4] Justice Minister MacGuigan also agreed with the Parliamentary Committee's recommendations on the burden of proving a defence. In June of 1984, he announced that it would be made clear that this burden is on the accused.[5]

The Special Parliamentary Committee also recommended the deletion of the requirement that the Attorney General consent to a prosecution under subsection 281.2(2).[6] The rationale for doing so was a desire to permit private prosecutions of hate literature. The Committee perceived that the section had not given rise to the volume of complaints that had promoted the requirement for the Attorney General's consent.[7] Justice Minister MacGuigan announced in June, 1984 his intention to also accept this recommendation.[8]

We did not receive much comment on the issue of defences to this charge. However, the suggestions for removing the requirement of consent is consistent with recommendations made to this Committee.

We have given serious consideration to the proposals for using subsection 281.2(2) where pornography is concerned. There are, in our view, a number of arguments in favour of taking this course.

If one accepts the argument that pornography is an expression of misogyny, then use of the hate propaganda section of the *Code* in this connection is particularly attractive. If the evil seen in pornography is the communication of an untrue message which expresses or propagates hatred against women, it seems logical that this *Code* provision, and not one dealing with sexual morality, should be aimed against it. Indeed, precisely this point was made by the Board of Inquiry considering the application of the Saskatchewan *Human Rights Code* to the Engineering Students' Society publication *Red Eye*. The Board observed that in the existing criminal law, it seems to be circuitous that women have to use the provisions about obscenity to enforce protection from some of the widespread manifestations of hatred focused upon them.[9] The Board considered that the evil of pornography was very similar to the evil aimed at by section 281.2 as it now stands.

We have, of course, recommended an overhaul of the sections which now appear in the *Code* under the heading "Offences Tending to Corrupt Morals", including the replacement of obscenity prohibitions by a comprehensive set of prohibitions. If our recommendations are implemented, then the contrast between the intent of pornography and the terminology and philosophy of the criminal law will not be as great as it is now.

However, the contrast between the hate implicit in pornography and the sexual morality overtones of "obscenity" is not the only reason for proposing to broaden subsection 281.2(2).

Section 281.2 was enacted following the report of the Minister of Justice's Special Committee on Hate Propaganda, 1965-1966. The Chairman of that Committee, Professor Maxwell Cohen, has identified the following passage from the Report's Preface as expressive of the Committee's rationale for proposing the hate propaganda amendments to the *Criminal Code:*

> This Report is a study in the power of words to maim, and what it is that a civilized society can do about it. Not every abuse of human communication can or should be controlled by law or custom. But every society from time to time draws lines at the point where the intolerable and the impermissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.
>
> An effort is made here to re-examine, therefore, the parameters of permissible argument in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is also a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assaults - the non-facts and the non-truths of prejudice and slander. Hate is as old as man and doubtless as durable. This Report explores what it is that a community can do to lessen some of man's intolerance and to proscribe its gross exploitation.[10]

The nub of the test, then, is whether the message that is sought to be made criminal does "injury to the community itself and to individual members or identifiable groups".

The argument that pornography does indeed do such injury has a number of features. We described in this Report the present state of experimental literature exploring the relationship between pornography and acts or states of mind on the part of its consumers that could be regarded as harmful to women. We have concluded that the research has not proceeded past the inconclusive stage. However, there is another sort of harm altogether which we think should be taken into account when considering the impact of some types of pornography for purposes of the hate literature provision. Section 15 of the *Canadian Charter of Rights and Freedoms* guarantees equality before and under the law and the equal protection and benefit of the law, without discrimination on the basis of sex. This guarantee is reinforced by the provision in section 28 that the rights referred to in the *Charter* are guaranteed equally to males and females. It is argued that one of the group of community values which is harmed by pornography is the constitutionally entrenched equality of women, in that the message of pornography is that women are inferior and subordinate.

This argument received support in the decision of Mr. Justice Quigley of the Alberta Court of Queen's Bench, in *R.* v. *Keegstra.*[11] It had been argued that section 281.2(2) of the *Code*, under which James Keegstra had been charged, was contrary to the *Charter's* guarantee in paragraph 2(b) of freedom of expression, and could not be characterized as a reasonable limit demonstrably justifiable in a free and democratic society, so as to prove constitutionally permissible. Mr. Justice Quigley took the position that it was appropriate to consider all of the *Charter's* guarantees when determining whether an alleged curb on one of them was justifiable. Against the freedom of expression guarantee he balanced the equality rights conferred by section 15 of the *Charter*, and the proviso in section 27 that in interpreting the *Charter*, Canada's multicultural heritage must be borne in mind. The need to protect these interests would justify the incursion by section 281.2 into freedom of expression.[12]

It seems to us that this balancing of interests is a desirable one. The guarantee of freedom of expression must, in our view, be tempered by the sometimes countervailing demands of the equality guarantee.

This position seems to us to be reinforced by a further consideration emanating from section 15 of the *Charter*. Subsection 15(1) guarantees the equal benefit of the law without discrimination on the basis of sex and a number of other grounds. Section 281.1(4) of the *Code* provides that "identifiable group" for purposes of the provision means a group distinguished by "colour, race, religion or ethnic origin." It is apparent that the "benefit" of section 281.2 is not available to members of groups identified by some other of the enumerated categories in subsection 15(1) of the *Charter*, like sex, age, and disability. It could be maintained, on that basis, that section 281.2 does not go far enough in the protection it provides and, for that reason, is vulnerable to consitutional challenge. Perhaps a simple failure to include a particular group mentioned in subsection 15(1) might not, in and of itself, render section 281.2 unconstitutional. However, it would be more likely to be found unconstitutional where the excluded group is also the target of the kinds of messages forbidden by the section. The arguments and evidence before this Committee give, in our view, ample evidence that women are the targets of messages promoting hatred against an identifiable group.

It seems to us, then, that if provisions like section 281.2 are to be included in the *Criminal Code*, there are strong arguments on equality principles, stemming from the nature of pornography, in favour of extending the protection of the law to women as an identifiable group.

Having said that, however, we must examine still further questions relating to this equality rationale. The first is whether its logic requires a further extension of the hate provision to cover groups distinguished by all the other enumerated characteristics in subsection 15(1) of the *Charter* which do not now appear in section 281.2. If so, what are the implications of such an extension? We note that the hate message sections of the Canadian, Manitoba and Saskatchewan Human Rights Acts all extend the protection to each protected group covered by the legislation.

By the same token, we observe with interest recent amendments to the regulations under the *Broadcasting Act*. It is now forbidden for an AM or FM licensee to broadcast "any abusive comment which, when taken in context, tends or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[13] These grounds are the ones specifically enumerated in the equality rights section of the *Canadian Charter of Rights and Freedoms*. The new regulations for television and for pay television broadcasting are similar, extending not only to comment but also "abusive pictorial representation".[14]

The case of pornography involving children provides a useful point of departure to examine these questions. It is certainly the case that not all the children portrayed in the material deplored by presenters of briefs are female children. Accordingly, even a section including as an identifiable group "persons characterized by sex" would fail to protect all those who, on the basis of the argument set out above, would be in need of protection. It would seem, taking this ground alone, that some further bases would have to be added to make the benefit of the section really equal. On the other hand, however, it was not argued before us that pornography involving children was hate literature, in the same way that this point was made concerning pornography involving women. The complaints about child pornography focused largely on its exploitation and corruption of the innocent, and did not argue that this material taught us to hate the young. It might be argued on that basis that the dual rationale for extending the section, namely equality considerations and whether the evil aimed at actually can be described as material promoting hatred, is not present.

Given the nature of the material and submissions we have received in the area of child pornography, we doubt whether the dual rationale for extending the section to persons identifiable by age is present. We would make the same observations with respect to the other protected grounds listed in section 15 of the *Charter*. At this time, we simply have no evidence on which to conclude that hate propaganda with respect to these groups is being disseminated. On the other hand, however, we are aware that the imperatives of the *Charter* are strong ones. We have seen, in the case of the hate message section of the *Canadian Human Rights Act*, the *B.C. Civil Rights Protection Act, 1981*, and sections 281.1 and 281.2 themselves, how responding quite specifically to a particular emergency can result in legislation that can soon be perceived as too narrow.

We have concluded that it would be desirable to expand the definition of identifiable group in section 281.1(4) of the *Code* to include protection for an identifiable group based on sex or gender and we see little cogent reason for refraining from extending it to other groups named in the *Charter*, even if the need may not be immediately obvious. We think, however, that this change must be accompanied by implementation of the three changes recommended in *Equality Now!* and accepted by the Justice Minister of the day in responding to that report: removal of the requirement of wilfulness from the section; removal of the requirement that the Attorney General consent to a prosecution, and classification of the defences.

Recommendation 38

The definition of "identifiable group" in subsection 281.1(4) of the Criminal Code should be broadened to include sex, age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.

Recommendation 39

The word "wilfully" should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.

Recommendation 40

The requirement in section 281.2(6) that the Attorney General consent to a prosecution under section 281.2(2) should be repealed.

We do not think that removing the requirement of specific intent which is contained in the word "wilfully" will leave section 281.2 unduly broad. Still in place is the requirement of general intent which is an ingredient of every criminal offence. Thus, a person who unwittingly or accidently communicates a message will be spared conviction.

In the area of pornography, a wilfulness requirement would place an almost impossible burden on the prosecutor. The effect of material may be to engender hatred of women, but persons may all too readily establish that this was not done "wilfully". The motive behind the publication may be described as sexual entertainment, or simply profit; even an unattractive motive, other than hatred, would serve to defeat a prosecution where specific intent was required. Such a result is surely not desirable, for it amounts to saying that one might create messages promoting hatred against women, or other groups, as long as that effect is only incidental to the profit motive.

We are mindful that some persons fear that removal of the requirement of the consent of the Attorney General will bring a flood of prosecutions, many of which would be ill-founded. The fear of potential harm to the innocent accused is behind these concerns. A slightly different perception of the issue is the concern that without the requirement of the Attorney General's involvement, important cases which should be won will be bungled by inexperienced complainants, with or without legal advisers. With regard to the first of these concerns, the Report *Equality Now!* notes that there have been fewer than six prosecutions under the hate provisions since their enactment.[15]

We expect that attempts to use the revised section by way of private prosecutions may, indeed, occur frequently during the first period of its being in force. However, once the limitations of the provision are recognized by citizens and lawyers, resort to it may decline. The section, in our view, will indeed cover a very limited range of material, for much that is repellent, or even criminal, may not be considered to be a message of "hate", even in the sense of misogyny. We hope that the other sections we propose to deal with pornography will, as well, reduce the need for persons to resort to private initiative by way of section 281.2.

We also think that extension of subsection 281.2(2) to include the hate messages of pornography may well require another change to the definitions in the section. At present, only "statements" are caught by the provision. Subsection 281.2(7) defines statements as including "words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations". Because the general term "visible representations" may be interpreted along the lines of the specific ones preceding it, namely "gestures" and "signs", we question whether the graphic images of pornography would come within this definition.

Many of the messages that convey hatred of women may be by way of visual representations, or a combination of the visual and written. At the hearing in Québec City, for example, we were shown a tabloid bearing on the front a photograph of a fully dressed woman, on her hands and knees, wearing a heavy leather dog collar and being pulled by a lead. Across the picture were words suggesting that as women are bitches, they should be chained. The combination of the colour photograph of the woman subjugated like an animal, and the words, was most compelling. In one notable instance, no words were used at all. Often drawn to our attention at the public hearings was a cover from Hustler magazine showing a meat grinder. Protruding from the top were what remained of shapely female legs. Coming out at the other end was red minced meat.

We suggest that the term "visual representations" (or a term like it) be added to the section, to introduce some certainty as to whether a photo or other graphic way of conveying hatred would be included.

Recommendation 41

> **The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.**

Given the hope that our other proposed sections, particularly those dealing with sexually agressive pornography, will deal with much of the material which offends, what area then is left to the hate provision? Violent or degrading material which is not sexually explicit may well be reached by a revised section 281.2. Additionally, we note that with respect to prosecutions under section 281.2, there is no defence of artistic merit, education or scientific purpose. The section may thus be regarded as a sort of complement to the provisions we have recommended to deal with "sexually violent and degrading" material, which do provide defences of these sorts.

We think that one of the important reasons for extending the reach of section 281.2 is because of the symbolic value of the extension. The ideas that pornography is a form of hate message about women, and intimately connected with the misogyny of our social institutions, are conceptually very significant. In shifting our thinking on pornogaphy from notions of sexual impropriety to concerns about human dignity and responsibility, these ideas have illuminated, in our view, the real evils of pornography. As they are significant, they merit inclusion and embodiment in the criminal law.

Footnotes

[1] The definition is found at s.281.1(4) of the *Criminal Code*. It is incorporated into s.281.2 by s.281.2(7).

[2] Special Parliamentary Committee on Participation of Visible Minorities in Canadian Society, *Equality Now!*, (1984, Supply and Services Canada, Ottawa) at 69-70.

[3] Minister of Justice and Attorney General of Canada, News Release: "Justice Minister Proposes Measures Against Hate Propaganda", June 1, 1984, at 1-2.

[4] *Equality Now!*, Recommendation 37, at 71.

[5] Minister of Justice News Release at 2.

[6] *Equality Now!*, Recommendation 37, at 70.

[7] *Ibid., at 69.*

[8] Minister of Justice News Release at 3-4.

[9] *Saskatchewan Human Rights Commission* v. *The Engineering Students' Society, University of Saskatchewan et al.*, 7 Mar. 1984 unreported (Red Eye Decision) at 32.

[10] Maxwell Cohen, "The Hate Propaganda Amendments: Reflections on a Controversy," (1970) 9 *Alta. L. Rev.* 103, at 113.

[11] *R.* v. *Keegstra*, 5 Nov. 1984 (Red Deer) unreported (pretrial hearing).

[12] *R.* v. *Keegstra* (pretrial hearing) at 20-23.

[13] *Radio A.M. Broadcasting Regulations, amendment*, SOR/84-786, schedule, s.1 (amending s.5(1)(b)); *Radio (F.M.) Broadcasting Regulations, amendment*, SOR/84-787, schedule, s.1 (amending s.6(1)(b)).

[14] *Television Broadcasting Regulations, amendment*, SOR/84-788, schedule, s.1 (amending s.6(1)(b)), *Pay Television Regulations*, SOR/84-797, s.6.

[15] *Equality Now!*, Recommendation 35, at 69.

Chapter 26

Film Classification and Censorship

1. National Action

A number of submissions to the Committee suggested that Canada implement a film review and classification system on a national scale. There are several different ways of structuring such a system.

One would be to encourage the various provincial boards to consult with one another to develop uniform standards of acceptability. Then each board operating locally would apply the common standards, and no new body need be set up.

Alternatively, the provinces could set up a national or joint board to which each province would appoint representatives. The Manitoba legislation contemplates such a possibility by providing that Manitoba may co-operate with the governments of other provinces in appointing a joint film classification board of not more than 15 persons, nominated by the provinces. The joint board would classify films or slides to be exhibited in the member provinces.[1]

A third possibility is that the national review function could be an aspect of an expanded and improved Customs service. In Australia, the authority for the federal government to have a censorship board arises from its jurisdiction over Customs, and, by agreement, the states have given to the national board the power which they have to review locally produced films.

We have considered the suggestion that we opt for a national review function, (see Section II, Chapter 14 of the Report) along with each of the ways in which it would be possible to bring it about, and we have decided not to recommend this approach.

It seems to us that review at the provincial level serves a valuable function. We have been impressed by the desire of people to feel that they have access to the review process, and that they can influence its decisions. A national board would be even more remote, in the eyes of some, than the boards now located in the provincial capitals. Over and over again, we were told that standards of acceptability do vary from place to place in Canada. The provincial board can and should be more sensitive to local taste, albeit within the framework of the national criminal law, than a national board could be. As we discuss elsewhere, we have recommended the deletion from the *Criminal Code* of the "community standards" test which now helps determine whether material is obscene, because we do not think that this element of subjectivity has a role to play in the criminal law. The community does, however, have a useful role in determining what it wants its young people to see, as opposed to determining what is criminal, and we think that that role can be exercised to more effect on a provincial rather than a national basis.

Recommendation 42

Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.

2. Problems with Co-ordination of Provincial Regulation

Having rejected the prospect of review on a national scale, however, we must still observe that there are problems affecting a provincially-oriented system which bear looking into. We have noted that some provinces and territories have no local film review authority. In this position are Newfoundland, Prince Edward Island, the Yukon and the Northwest Territories. Although they may consider it suitable to borrow the classifications of others, it seems that absence of legislation may be depriving them of more than a classification function.

The provincial film review legislation, for example, requires that theatre operators observe classifications, advertise them, and post them by the entrance to the theatre for the guidance of patrons. We heard complaints in Whitehorse that local theatres were inconsistent in their practices concerning notification of film classifications. Parents were sometimes unable to determine whether or not a particular movie would be suitable for their children. Some complained, in a similar vein, about non-enforcement of age restrictions on entrances to theatres.

Accordingly, we think that it would be desirable for provinces without film review legislation at present to explore whether they wish to enact it, in whole or in part. Even if they do not have the inclination or the resources to institute review of films, the aspects of the typical film review legislation which might usefully be enacted are those concerning notification of the classifications and entrance restrictions for children.

Recommendation 43

Those provinces and territories which have not implemented a film review system should consider doing so.

Another difficulty which will persist with a provincially-based system of review and classification is the problem that clearance in the most permissive jurisdiction can be, in effect, clearance for national purposes if the films are videotaped and then made available for private as opposed to public usage. It is, in our view, inevitable that entrepreneurs will take advantage of the differences in standards between provinces by using the most permissive jurisdictions as clearing houses for films destined for national distribution as videos. Mail order houses based in these provinces will offer material to a national market.

This problem of the *de facto* national influence of the boards in some jurisdictions in this regard was addressed by many briefs at our public hearings. The boards most often noted in this connection are those of British Columbia and Québec, which take a more tolerant view of some kinds of explicit material than does, say, Ontario. This issue generates considerable frustration and concern, especially among those whose views do not accord with the views of the boards which they perceive to be having this national influence.

We can appreciate the concern that is reflected in these submissions. However, in most jurisdictions, only films or videotapes intended for commercial exhibition are required to be reviewed and these represent a small proportion of the total amount of material in circulation. Videotapes, not films, are the largest aspect of the home viewing market. At this time, videotapes for private use can be imported or produced and sold in most jurisdictions without any contact at all with provincial classification or censor boards. The circulation of the bulk of this video material cannot thus be laid at the door of any censor board, however relaxed may be its views on what is acceptable in films.

Moreover, we note with interest the introduction in some provinces of schemes to regulate sale and rental of videotapes intended for private consumption. This direct attack on the problem of unsupervised circulation of allegedly offensive material may be more effective than any attempt to enforce uniform standards on all boards, or establish a national board.

3. Relationship Between Customs and Film Classification

It seems to us that the real influence bearing on the circulation of offensive material within Canada is that of Customs. It is, after all, through Customs clearance procedures that films and videotapes are imported. One can expect provincial film review authorities to be, if you will, a second filter for videos which are imported only if someone within the province exhibits them commercially or otherwise brings them within the comparatively narrow scope of the film or video classification scheme.

Accordingly, we think that the emphasis in our inquiry about national circulation of offensive material should be at the point of entry: the Customs administration. We are, in regard to pornography as in regard to so many other things, an importing nation. The film review boards, even if co-ordinated on a national level, cannot really be expected to control the adverse effects of importation.

In one respect, however, the link between Customs and film review authorities bears closer examination. As we have said, films or videos intended for commercial showing must be reviewed by provincial authorities. Before they can be reviewed, they must be in the country. To effect their entry, their importers would ordinarily be required to satisfy Customs officials that the films are not "immoral or indecent", under the wording of the present *Customs Tariff*.

There has grown up a practice in some jurisdictions of rolling into one, the Customs determination of acceptability for entry and the provincial film review board's determination of acceptability for showing. There are many reasons for doing this. On a practical level, importers will not want to go to the trouble of bringing a film into the country only to be told some time later that it cannot be shown in the province. In addition, the volume of material passing through Customs is so large that the relief of sharing the review work with another authority may be welcome. On a more fundamental level, many believe that it is not the role of Customs officials to act as the arbiters of public taste. Although to some observers, this view extends to claiming that neither Customs nor the film classification boards should play this role, in others, it merely results in a preference for the provincial authority over the Customs branch.

Whatever its rationale, it is clear that this practice involves deference by the Customs officials to the view of the film review board. Such deference can manifest itself in a number of ways. In Ontario and British Columbia, films being imported go in Customs bond directly to the office of the censor. In Québec, a practice has developed of allowing the importer to take the films from Customs and deliver them to the Bureau de Surveillance. There is no control over what happens to the film on its way from Customs to the office of the Bureau. A period of 60 days is given by Customs to the importer in which to seek clearance of the film from the Bureau. In all these cases, once the film is approved by the provincial censor, it is granted entry to Canada, effective not from the date of the censor's clearance but rather from the date of its initial entry at the Customs port. Customs officials do not consider that they have totally delegated their own powers to the various censor boards, because they still retain, in theory, the power to refuse entry even to a film which has been accepted for exhibition in a province.

We heard numerous complaints about this sort of relationship between Customs and provincial film reviewers. Singled out for special complaint was the 60-day grace period allowed to films entering by way of ports in Québec. It was felt that the unscrupulous could use this period to make videos of the film which had been put in their custody. Then, even if it did not receive clearance for showing in the province as a film, the videos would nonetheless be circulating. Some witnesses have attributed to this scheme a high proportion of the offensive videotapes which they say are now circulating in Canada. It should be noted, however, that although such procedures may contribute to the circulation of pornographic tapes, a much more likely factor is that Customs only inspects a very small proportion of what actually comes into the country. Nevertheless, we have reservations about the apparent delegation by Customs authorities of their power to assess material entering the country. We are not comforted by their retention of a notional power to refuse or permit admission of a work contrary to the view of the local review board. In practice, we think such an overruling is unlikely to happen.

Our problem with this delegation is that it cuts into the attempt, and the opportunity, to forge national standards in the administration of the *Customs Act* and *Customs Tariff*. However much we may want to recognize the role of local taste in determining who sees what in provincial theatres, we think that there should be common national standards about what comes into the country.

We do not think that Customs officials should defer to the opinion of local boards. While to do so may have been helpful and convenient when the standards used by Customs to determine obscenity, and the level of officers' understanding, were relatively unsophisticated, we prefer that Customs concentrate in developing its own talents in this area. Although to resort to provincial assistance might be tempting given the scant resources available to Customs for the "pornography detail", we think that the focus should move to securing more resources. In our view, only the development of an active and sophisticated Customs will really address the problems of entry into Canada of pornographic material.

We have attempted to discover the details of the 60-day grace period in Québec which so angered some of the witnesses at our public hearings. They are discussed in detail in Section II, Chapter 14. Here, let us observe that, in our view, the more serious problem is the general influx through Customs of material which, because it will not be shown publicly, may never even be legally required to go to a film censor, rather than the possible abuse of the Customs/censorship interface in respect of a small amount of material. Over and above that, however, we have been advised that Customs officials are interested in ending this arrangement. We urge them to do so.

Recommendation 44

Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.

4. Problems of Substance

We do not intend to comment here in depth on the details of running a provincial film review system. However, a few aspects of provincial regulation do have a bearing on our recommendations.

In devising our approach to pornography, we have proposed a three-tier classification of material. The most offensive material, that involving children or in which harm is suffered by the participants in its production, we would subject to harsh penalties, with no defences based on intent or value being available. The second tier of material is that which is sexually violent and degrading. Here we have recommended a new prohibition with respect to which the accused could defend the material (here a film or video) on the basis that it has artistic merit, or educational or scientific purpose. Material in this category is also subject to restrictions on its public display and on access to it by young people.

The third tier of material is that in respect of which we think there should also be controls on availability and display, but no absolute criminalization. We have restricted the use of the *Criminal Code* in this tier to prohibiting availability of this material to children, and to reducing its visibility and thus its capacity to shock or offend the unwilling consumer or passerby.

Because Customs is unlikely to be able to control the importation of all films and videos, we realize that some films which people would argue are unacceptable, will come into the country. In addition, of course, films that are produced within the country go to the provincial boards without any intermediary review.

Provincial film review boards will, therefore, be required to deal with all films that are presented to them with the purpose of being shown publicly. How they choose to respond to the material may vary, as it presently does among the boards. One approach is simply to classify the films according to the provincial scheme. A second approach involves the banning or cutting of films prior to a classification being designated.

One of the important roles of the state with respect to pornographic material is the protection from offence. We do not think, however, that as a rule, banning is necessary in order to protect people from being offended. We think that the classification systems now in place in the provinces have a major role to play in preventing offence, as do the controls on access to theatres by young people. The requirement of posting and advertising the classifications and the further requirement, in some jurisdictions, of warnings about certain kinds of content, are also in our view effective and desirable ways of helping people avoid the material which they do not want to see.

While we endorse measures like these in general, we do note that there are some difficulties with the working out in practice of these systems. Particularly with respect to classification, we are concerned that the standards upon which classification is being done do not always appear in the legislation, or even the regulations. We regret this for two reasons.

Firstly, the legislative delineation of standards is a valuable way to protect against improper use of discretion in the administration of a scheme; the rights of exhibitors will be safeguarded when the legislature enunciates standards which must be observed by those administering the law. Secondly, articulation in legislation ensures a certain publicity for the standards, and allows citizens to know what is being done on their behalf. No matter how many pamphlets a board may distribute discussing its classification scheme, the legislative articulation still is the most enduring. A government may wish to include its standards in regulation rather than legislation, because regulations can be more responsive to changing community values. However, in our view, positive results will flow from greater elaboration of the classification standards in law, be it statute or regulation.

We have also observed that the legislation often does not contain any articulation of the standards upon which a board will be prohibiting or cutting films. What we have said above about the advantages of enunciation of standards in law, we reiterate even more forcefully in this connection. The power to prohibit exhibition of films or to cut them is an intrusion on the right of freedom of expression guaranteed by paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*. It must be a reasonable limit, *prescribed by law* and demonstrably justifiable in a free and democratic society, in order to survive constitutional challenge. The case challenging the Ontario *Theatres Act* shows, in our view, that these provisions for prohibiting and cutting films are on an infirm constitutional footing. We think that the provinces will be interested in reviewing them to ensure compliance with the *Charter of Rights*.

Of course, one way of ensuring compliance with the *Charter* is to remove from the provincial boards the power to cut or to ban films. We prefer this approach. If the provincial board is of the view that the film is caught by the prohibitions against first or second tier material, then presumably the board does not need any additional power to prohibit or to cut it. For greater certainty, the statute may provide that the board may decline to classify a film which, in its view, contravenes the *Criminal Code*, but there would be no power to cut, and no power to prohibit the showing of anything not prohibited by the *Criminal Code*. If material is not prohibited by the *Code*, then we believe that it should be shown, at least to those who wish to view it.

Recommendation 45

Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.

If the provinces decide to maintain the power to prohibit or cut films, then we strongly recommend that the standards upon which these decisions will be made should be embodied in legislation, or at least in regulations.

Recommendation 46

Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.

5. Advertising Restraints

There exist in provincial legislation, broad powers to control advertising of films. In addition to specific provisions requiring that the classification of a film be shown in advertising material for it, the legislation usually confers a power of prior restraint of advertising on the authority. Advertisements must be submitted to the board, which may approve or disapprove them.

We think that the rationale for this system of prior restraint has a lot to do with the exercise of the prior restraint powers of the boards with regard to film censorship. It would be regarded as inconsistent to go to the trouble of removing a particular scene from the film only to have it appear on the billboards outside the theatre. Interestingly enough, however, Manitoba, a province which does not censor films by way of prior restraint, has not only a power to impose prior restraint on advertising[2] but also a very intrusive power to remove offensive advertising from public places.

Any peace officer or inspector in Manitoba may be authorized by the board to order the removal from all public places of any advertisement relating to any film or slide if the advertisement is of an immoral, obscene or indecent nature or depicts any murder, robbery, criminal assault or the killing of any person. If the licensee of a theatre does not remove the material within 24 hours, then the licence will be cancelled by the Minister. There does not appear to be any right of appeal from an inspector's order.[3]

We are concerned with both the prior restraint of advertising and with broad power like that in the Manitoba statute just described. On the other hand, we think that it is quite reasonable, and entirely consistent with a scheme of classification, to require the theatre owners to include the classification of the film in advertising for it.

It seems to us that prior restraint on advertising is difficult to justify in light of the provision we have made to control display of visual pornographic material, discussed above. This provision would make it an offence punishable on summary conviction to display visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation. In our view, this offence would include display of such material in a theatre or outside it. The defence to the charge would be to demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advertising of the display within.

This sort of control upon the location of the third tier material is, to us, a far less intrusive way of protecting public sensibilities than the imposition of prior restraint.

Recommendation 47

The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.

6. Relationship Between Provincial Film Review Boards and the Criminal Law

The Supreme Court of Canada has stated that there is no constitutional reason why a prosecution cannot be brought under the obscenity provisions of the *Criminal Code* against a film which has been approved by a provincial review board.[4] Under the *Code* as it now stands, the issue is whether approval of a provincial censor board would amount to a defence against a charge under section 159 or section 163 of the *Code*. Section 159(2) prohibits the doing of a number of acts "without lawful justification or excuse", and it is argued that the approval of a censor board should, in law, amount to such a lawful justification. The Canadian Motion Picture Distributors Association made representations to this effect to our Committee.

As we have noted earlier in this Report, Bill C-19, the omnibus Criminal Law Amendment Bill introduced in early 1984, would have recognized the operation of provincial law respecting film classification. With respect to offences under sections 159 and 163 of the *Code* the bill proposed a new section 163.1, which would have required the personal consent of the Attorney General to a prosecution of a film or videotape presented, published or shown in accordance with a rating or classification established pursuant to the law of the province where the film was shown. This provision would not have helped in those provinces without a local film classification system, of course, but the Motion Picture Distributors' Association nonetheless regarded it as an improvement over the previous laws.

We do not include in our proposed amendments any provision of this nature. We recognize that whether they have explicit power to ban films or not, an authority will inevitably make a preliminary determination of whether, in its view, a film offends the *Criminal Code*. Yet, even though this determination about criminality is going to be made, we do not think that it is desirable to elevate the board's judgment to the status of a defence or a discretionary bar to prosecution. If the board's decision were to constitute a full defence, then we would have, in effect, a delegation to provincial authorities of administration of the criminal law sanction. Where the decision of the board is a discretionary bar to prosecution, as in Bill C-19, the delegation is not complete, but the concern remains the same.

True, local prosecutors make decisions about what charges to bring under the *Criminal Code* and that is a form of decentralization, but it is not decentralization that is really the concern here. In our view, the objectives and the outlook of the classification or censor boards, while somewhat congruent to those of the law enforcement authorities, are nonetheless different from them. They are concerned primarily with community tastes, with the making of those kinds of subjective evaluations about what offends which we have sought to remove from the criminal law. We do not think that it would be useful to reintroduce that element into the law, indirectly, by means of reliance on the judgment of classification or censor boards about what breaches the criminal law.

It will be said, of course, that one is relying on the board's assessment of what does not breach the law, rather than on their assessment of what does. Surely, it will be argued, we can be certain that something does not offend the law if it is approved by a board as strict as the Ontario one, for example, and we need not hesitate about conferring immunity from prosecution. Here we meet again the concern about the variation from jurisdiction to jurisdiction in local censor board standards. Some boards may well take a different, and more permissive view, of the criminal threshold than would the local Crown attorney or the court. If a film were passed by such a board, then one might still not wish to insulate it from scrutiny by a court. In such a case, a provision like that in the proposed section 163.1 would produce the unhappy spectacle of the Attorney General and classification or the censor board at loggerheads.

The standards used by Crown attorneys and judges to determine criminality may well, of course, vary from place to place. But the fact of regional variation in the criminal justice system does not mean that we should add yet another system (itself affected by regional variation) to the decision-making process, possibly to conflict with the criminal justice system.

We are prepared to make one exception to this general position, an exception which is made necessary in our view by our recommendation on access of children to visual pornographic material. We have recommended that the *Criminal Code* make it an offence punishable on summary conviction for everyone who is the lessee, manager, agent, or person in charge of a theatre, to present therein to anyone under 18 years of age, any visual pornographic material. This provision could well include the acts of a theatre owner in showing a movie classified in the adult or similar category, for viewing by persons over 14. The film, while not restricted, might nonetheless contain some scenes which would attract the operation of the proposed section.

We have provided a defence to this offence for anyone who can demonstrate that the film or tape has been classified under the rating system for film and video in the province, as acceptable for viewing by those under 18. Thus, the certification of the board would insulate the theatre operator from prosecution.

Here, we are not deferring to the decision of a provincial authority about whether to prohibit a film or not; we are dealing with classification only. Moreover, the material being classified is, we assume, legal according to the *Criminal Code* provisions we have devised. Otherwise, presumably the board would not have classified it at all. So, we are really deferring here to the board's judgment about who should see legal material. We are content to defer in these circumstances.

Recommendation 48

> **Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the Criminal Code, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.**

7. Regulation of Video Recordings

There was strong support at the public hearings for review and classification schemes applicable to video recordings sold or rented for private use. The major concern of advocates of this proposal was for young people. Worried about the kinds of violence, degradation and explicit sex which children might be seeing on videotapes, parents and others were concerned that they now have almost no effective way of monitoring children's viewing.

We were told that the covers and advertising of videotapes often do not give accurate clues about the nature of the film. The merchants who rent tapes may not be as vigilant as many would hope in ensuring that young people avoid the worst material. Even where the retailer is watchful, young people may be getting videotapes in the same way that they traditionally got liquor or cigarettes: having an older youth obtain supplies for younger peers.

The ease with which videotapes can be duplicated means that they will be widely and readily accessible. Outlets have proliferated, with videotapes being available anywhere from the large department store to the corner gas station to the specialized video outlet, be it an "adult" video club or neighbourhood family store. Video recorders are now reasonably widely available in private homes across Canada, and home viewing means that consumption of the materials can take place in private. For many young people, this means away from supervision.

At present, only Ontario and Nova Scotia have included distribution of videotapes for private viewing within the provincial classification schemes.[5] Apart from these initiatives, which happened so recently that information about how effective they are was not available to us, there are almost no controls on videotapes intended for private use. Conceivably, of course, importation of videotapes would be subject to Customs regulation, but there was a widespread feeling that this is presently most ineffective. There simply are not the resources to enforce the *Customs Tariff* thoroughly. The distribution by mail of obscene videotapes would be within the *Criminal Code* and *Canada Post Corporation Act* provisions respecting use of the mails for distribution of pornographic materials, but here again, enforcement is perceived as ineffectual.

We can see some real merit in having a regulatory scheme designed for video recordings that are not shown publicly. We believe that the scheme should include only classification, but not prohibition or cuts. The power to prohibit, in our view, should be no more than a power to prohibit circulation of material offending the *Criminal Code* law, as we have recommended in the case of film classification.

Recommendation 49

> **Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the Criminal Code but not be empowered to prohibit or cut video recordings which are not contrary to the Criminal Code.**

Both Nova Scotia and Ontario have used the device of the film exchange licence to bring video retailers within the ambit of provincial legislation. Clearly, in our opinion, regulation of videotapes belongs at the provincial level, if done at all, and we see merit in the Ontario and Nova Scotia approach.

There are a number of problems which confront any authority seeking to regulate videotapes. One of the threshold issues is whether and to what extent videotapes should be submitted to a board and classified. At the point of starting up a system, the classification task (of all existing tapes available in retail outlets) would be huge. Even once that bulk had been digested, however, the large number of videotapes in circulation would still make the classification task formidable.

Even though regulation of videotapes is a recent innovation, there are already two different approaches to this problem. The *Video Recordings Act, 1984* of the United Kingdom requires that all videotapes, except for those in certain exempted categories, be presented to the authority in order to be classified. Nova Scotia, on the other hand, recognizes that tapes in an "unclassified" class will be distributed. In many instances, the videotape will be a reproduction of a film which itself has already been classified, and the classification of the original film will apply to the tape. However, not all tapes will be reproductions of classified works. It is clear that the thorough solution, to classify everything, is also the most demanding of resources.

The issue of advertising the classification may well present some technical difficulties. Affixing labels to the cartons and the tapes is possible, but boards may wish to consider whether it is possible or desirable to put some mark on the actual film of a cleared tape. In the course of our consultations, we learned of the importation into Canada of a large number of empty boxes for a particular videotape. No tapes of that title were cleared through Customs. The cartons seem to have been destined for underground copies. Unless some symbol of board approval, which is difficult to counterfeit, could be put on the tape itself, it would be difficult to control this type of circumvention of a local system.

The Nova Scotia plan has a feature which we find quite attractive in the context of this problem of advertising. The regulation requires the retailer to put the classifications on each list of tapes distributed to customers. Such a requirement will aid in achieving what must be one of the most important objectives of this type of scheme: putting into the hands of parents and other adults the means of monitoring and guiding the viewing activities of their youngsters.

Another issue to be faced by those contemplating establishment of a video classification scheme is that of penalties for breach. Presumably, a key element in the scheme would be a requirement that persons not distribute tapes to those for whom the classifications indicate they are not intended. Our survey of the provincial censorship legislation shows, however, that any penalties provided for breach of the *Acts* or regulations are quite small. As systems founded on prior restraint, and aimed at preventing showings rather than penalizing them after the fact, these censorship regimes have not depended for their efficacy on prosecutions.

Yet proliferation of videotapes and the tremendous variety of outlets where they may be available, coupled with an absence of prior restraint, leads us to suggest that the issue of penalties should be a serious one to framers of any video regulation scheme. The *Video Recordings Act, 1984* of the U.K. provides quite substantial penalties. Supplying a video work in respect of which no certificate has been issued will, for example, attract a fine not exceeding £20,000.[6] Forfeiture of the videotape involved in the offence is also called for.[7] We think that using stiff penalties for violations of the scheme is preferable to using prior restraint.

A further element of a video retailer licensing scheme might usefully be considered. If retailers were required to keep a log showing the source, to them, of the various tapes which were sent to their stores, then bootleg tapes might be more readily detected. A tape which appeared in stock but in respect of which there was no *bona fide* supplier listed in the log, could well prompt the sorts of inquiries which might disclose not only breaches of the classification system but also of Customs legislation.[8]

Footnotes

[1] See s. 22(4) of the Manitoba *Amusements Act*, enacted by S.M. 1972, c. 74, s.4.

[2] *Ibid.*, s.22(3)(b).

[3] R.S.M 1970, c. A70, c. 24.

[4] *Re Nova Scotia Board of Censors et al and McNeil*, [1978] 2 S.C.R. 662, (1978) 84 D.L.R. (3d) 1, *per* Ritchie, J. at 24.

[5] The government of British Columbia announced plans to regulate videotapes early this year. The details of those plans have not yet been made public, however.

[6] *Video Recordings Act, 1984*, c. 39 (U.K.) s.15.

[7] *Ibid.*, s.21.

[8] A parallel to this recommendation is the provision in s.103 of the *Criminal Code* requiring firearms merchants to keep a record of transactions and an inventory of firearms.

Volume
2

Pornography and Prostitution in Canada

Report of the
Special Committee on
Pornography and Prostitution

Volume 2

Canada

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Part III

Prostitution

Section I

Prostitution as a Social Issue

Chapter 27

Views from the Public Hearings

1. Introduction

If one thing became clear during the public hearings across Canada, it was that there is no consensus on the subject of prostitution in this country. Many of the hundreds of organizations and individuals who presented briefs at hearings in 22 different centres across the country were concerned about prostitution, often for different reasons, but their proposed solutions ranged all the way from those who would have the law eliminate prostitution entirely to those who would legalize or decriminalize it.

The types of groups presenting briefs on prostitution tended to be somewhat different from those who presented briefs on pornography. Most of the briefs on pornography were from women's organizations and church groups, with a smaller number from community organizations, educational associations and civil liberties groups. The briefs on prostitution, on the other hand, came primarily from police and municipal officials such as mayors and aldermen of affected cities, community and business associations in affected areas of cities and a smaller number of women's groups, gay groups, prostitutes' associations, churches and social work associations.

Many women's groups said that while they recognized the importance of the problem of prostitution and would have liked to contribute to the discussion on it, they had been so involved in researching and campaigning against pornography that they simply did not have the time or the resources to prepare an adequate brief on prostitution.

The focus of the briefs varied according to the type of group making the presentation. The police, civic officials and community associations tended to favour tougher laws designed to drive prostitutes off the streets, with very little discussion as to where they might go. Women's groups, social work associations and some churches were primarily concerned with the welfare of the prostitutes themselves, who they considered to be victims, rather than criminals.

This dichotomy was more pronounced in the views expressed on how prostitution was affecting individuals, families and communities.

2. Prostitution and its Effects

2.1 Effect on Communities

The cities most seriously affected by prostitution, according to the views expressed at the hearings, were Vancouver, Toronto, Montréal, Calgary, Halifax and Niagara Falls. Community groups, particularly in Vancouver, Toronto and Halifax, where street prostitution had moved out of commercial and industrial sections of the city and into residential areas, presented the most vivid descriptions of the effect prostitution was having on their communities.

> What you see in the West End [of Vancouver] is the total disintegration of a neighbourhood and a social impact as well as an economic impact on its residents, which extends from seniors to school children. *Pat Carney, MP, Vancouver Centre*
>
> There is no fixed place for this service. It is practised in many public places like cars, in back lanes, in parking lots and underground parkades of apartment buildings. *Rental Housing Council of B.C., Vancouver*
>
> ...the tenants suffer a serious decline in the quality of their living conditions and environment. Tenants are faced with the problem of prostitutes working from very early in the morning to catch the going to work crowd, right through the noon and dinner hours to catch the "quickies", and then all-night traffic which will continue to four and five o'clock in the morning. This kind of activity is repugnant, at best, to the average resident in the community. In addition to this kind of activity, there is...continual verbal harassment of residents, prostitutes, and customers alike, all through the day and night.
> *The West End Tenants Association, Vancouver*
>
> [Sex in itself isn't bad, but] the hatred and violence generated as a result of street prostitution certainly is bad. The pimps hate the girls, the girls hate the pimps, the girls hate one another and hate themselves. They all certainly hate us, the homeowners out of whose neighbourbood they work, and we hate them. The relationship of pimps and girls and tricks is apparently a perfect growing medium for outright violence at the worst of times and minor skirmishes of aggravation at the best of times.
>
> I illustrate the severity of the problem in our neighbourhood by just one anecdote. Not so long ago one of the girls, stationed in front of my house and several months pregnant, was stabbed in the belly by her pimp in some disciplinary move. She bled profusely through her hands, he casually watched as we pleaded in vain for her to get into an ambulance. When we finally drew off in defeat he threw her into the back seat of his car and drove away.
>
> Such nightlife affects my life. The situation in my neighbourhood has become one of the forced sharing of not just our sidewalks but of my OWN DOORSTEP with half a dozen girls between the hours of 8 p.m. and the early morning.
> *Jill Robinson, Halifax*
>
> [There is] congestion on the sidewalks, high noise levels, increased vehicular traffic, with disregard of laws, harassment of our members while walking on the street, many with canes, walkers or wheel chairs, increased litter, and lack of safety in the evening. Night after sleepless night, [we] suffer from a barrage of squealing tires, breaking bottles, screaming, laughing, cursing, crying.
> *The West End Seniors Network, Vancouver*

> Our streets are already sex ghettos, with prostitutes as commodities. What a terrible effect on the [residents] of a neighbourhood ... no rational society can ever permit what we see happening daily in our neighbourhood: juvenile prostitutes enslaved by their pimps, offering themselves for sale on public streets... Will the neighbourhood residents no longer have safe and free access to their streets for fear of the transient and migrant prostitute population? We want our streets returned to us.
> *Homewood Residents Association, Toronto*

As we will discuss in Chapter 28, it is difficult to get accurate and reliable estimates on the number of street prostitutes, and thereby, some assessment of the potential disturbances to neighbourhoods.

Estimates of the number of street prostitutes working in major Canadian cities were given to the Committee in general briefs from police officials and social workers. In Montréal, the Fraternité des Policiers de la Communauté urbaine de Montréal Inc. estimated that as many as 5,000 juvenile prostitutes work in the greater Montréal area. In Toronto, police estimated that 600 full-time prostitutes work in that city, but the Canadian Organization for the Rights of Prostitutes, Toronto, claims that when the "irregulars" are added, the total is at least 1,000. The police estimate for Vancouver was 600, with the Vancouver Multicultural Women's Centre estimating that one-half of them are visible minority women.

In Halifax, it is estimated that between 30 and 40 prostitutes work in a downtown area that has traditionally been their venue, but as middle-class renovators have moved into the area, the number of complaints to police has increased. In addition, the Nova Scotia Association of Social Workers reports that there is a good deal of activity aboard ships, as there is no provincial or local statute controlling this activity, as there is in Newfoundland.

On the prairies, where most of the prostitutes are young native women, Calgary police say they have a prostitute population of approximately 100, with the number increasing to about 150 in the summer. Most are under the control of about 75 pimps. They work in a downtown commercial area, with the result that the police receive numerous complaints from businesses, restaurants, hotels and apartment dwellers.

Winnipeg reports 400 to 500 prostitutes, with about half of them working on the street, while Regina police report 40 habitual street level prostitutes, only two of whom are not native women.

In Niagara Falls, police reported about 80 to 100 American prostitutes regularly work near the Whirlpool Rapids, with 15 to 20 on view at any one time. Most of them are controlled by pimps. The prostitution trade at the local hotels has been controlled for the past three years by members of a local motorcycle club.

Given the variation in the number of prostitutes on the streets, it is apparent that not all cities are equally affected by the presence of prostitutes and their activities. Indeed, while many of the briefs from community groups and police insisted that the prostitutes were totally to blame for the disruption to the neighbourhoods in which they worked, some of the briefs from women's organizations and social workers took a different view. Women Against Pornography, Victoria, believes that the public nuisance effects are not caused by the prostitutes, but by clients and on-lookers. Vancouver Status of Women believes that the prostitutes are being "scapegoated for noise and traffic problems caused by others". Other groups argue that:

> [The current concern over prostitution involves] a police campaign to try to toughen the solicitation laws, as well as the manipulation by the police and moral conservatives of legitimate concerns by residents of [affected] neighbourhoods... These concerns have been organized into a campaign to criminalize prostitution and further clamp down on street prostitutes.
> *Pink Ink, Toronto*

> There is little street prostitution in most urban centres outside of Vancouver, Calgary, Toronto and Montreal. ...prostitutes have unjustifiably been focused upon by powerful urban lobby groups and the media, who have ignored other street populations which are equally problematic.
> *The Elizabeth Fry Society of Kingston*

Women's groups also placed considerable emphasis on the fact that many of the prostitutes first started working the streets as teenagers and that they should be regarded as victims, rather than as criminals.

> The prostitutes ...come from a very disadvantaged background. They are victims. There's very little hope for them to break out of that cycle and, certainly, they are getting younger and younger every year. They're not 19 to 25. They are kids, and they've got no place to turn, and they're runaways, and they're drug-dependent; and they are victims.
> *Nova Scotia Advisory Council on the Status of Women, Halifax*

2.2 Effect on the Family and Individuals

The effect of prostitution on all members of the family, including women, children and the family member who uses prostitutes, was of particular concern to some of the church and other groups who presented briefs at the public hearings.

> [Prostitution] is contrary to everything that constitutes a healthy marriage where life-long commitment and mutual love and respect are the basis for good family life.
> *REAL Women of Canada, Toronto*

> [The public is] intimidated from using streets and public places...because of the number of persons seeking to buy or sell sexual services on the street.
> *David Butcher, social worker, Vancouver*

> The West End prostitution scene has as its primary victims the women residents of the area, who for financial reasons cannot afford to move out. These are largely senior citizens and single mothers.
> *Concerned Residents of the West End, Women's Committee, Vancouver*

> It's been three years since I've been able to walk the half block from my home to the corner store, because of the looks and comments from cruising cars whose drivers assume that *any* female walking in my neighbourhood is a prostitute.
>
> How can I make you understand the feeling of vulnerability I have when walking on the streets of a city where I've felt safe for 20 years before the prostitutes appeared?
>
> How can I make you understand the fury I feel when I hear that prostitution is a victimless crime, when I feel I am a victim!
>
> How can I make you understand the intimidation I feel when I see and hear a pimp parked five feet from my kitchen window, or the revulsion that I feel when a man purchases sexual services in a car parked under my bedroom window and then to have a judge say that the law is powerless to stop him.
>
> How can I make you understand my frustration at the simplistic solutions of de-criminalizing or the like put forward by those who have no experience or understanding of this offensive and intimidating scene.
> *Elizabeth J. McNutt, Halifax*

The effect on young children of seeing prostitutes plying their trade on the streets near their homes and schools was of particular concern to community groups.

> In the West End, two elementary schools and one day-care centre are confronted by the presence of street prostitutes. Children go to school in the morning often to find hookers working their school sidewalks. And by the end of the day, the sale of sex just outside the school yards is busy and distracting.
>
> It is disturbing to watch young children stare at this activity as it flourishes around them.... The lack of any action to stop this activity clearly suggests to our children that selling their bodies anywhere is totally acceptable and obviously condoned by our society. Why else would it be taking place so freely?
> *Concerned Residents of the West End, Children's Committee, Vancouver*

And finally, the effect on the user of prostitutes' services:

> It provides sexual satisfaction at the high cost of guilt, sexual deviation, the loss of respect of other human beings, and often the loss of family and friends.
> *The Pentecostal Assemblies of Canada, Toronto*
>
> The beauty of human relationships is destroyed as the buyers of sexual favours see people and sexuality as a commodity for use and discard, rather than a developing relationship.
> *St. Andrew's-Wesley Church, Vancouver*

2.3 Effect on Prostitutes

Many of the groups expressed a strong sympathy for the plight of prostitutes, pointing out that contrary to popular opinion, being a street prostitute is not a desirable life. "At best it is degrading... At worst, it is dangerous," according to the Elizabeth Fry Society of Kingston, an organization which works with women prisoners.

... the public should be aware of the dark side of prostitution such as violence towards prostitutes by pimps and clients. Prostitution is decidedly not a crime without a victim.

[According to the sociological data surveyed, once a person has entered into prostitution] they are caught in a trap, with little choice but to continue.
Faculty of Law Students, University of Western Ontario, London

They have been and will continue to be subject to attacks by the customers and their pimps. National figures show that instances of drug use and addiction are inordinately high among street prostitutes, so much so that between violent death and drug overdose their mortality rate may be forty times the national average.
City of Regina

[The] illegality of prostitution traps them in the life, and makes them more vulnerable to violence, pressure from pimps and police, and harassment from men... By stigmatizing women as prostitutes, and by giving them criminal records through arrests for prostitution, it makes it even harder for them to get out of the life when they are ready.
Calgary Status of Women Action Committee, Calgary

In trying to change their lifestyle, these women are vulnerable, not only to societal censure but also to the vengeance and control of the pimps. Our staff is working with a young woman who has tried and is still trying to leave prostitution... One former pimp broke her nose and ribs when she wanted to opt out and, most recently, another pimp had her severely beaten because she would not join his stable.
The Children's Home of Winnipeg

2.4 Effect on Morals

Prostitution as a moral issue brought forth a variety of responses:

Of all the girls that we encountered, they regard themselves without exception, merely as "working girls". They don't consider themselves immoral. They suffer no embarrassment by being prostitutes, as they regard it as strictly a business deal and they truly feel that they provide a service to society.

It is interesting to note, however, that although they do not regard being a prostitute as bad, they will go to extreme lengths to keep this information from their families...None of them use their real name on the street. They all have street names or nicknames.
Niagara Regional Police Force, Niagara Falls

[We do] not feel that prostitution is an indication of...some sort of moral slide in our society... What it is, is the overt expression of the oppression of women in our society...
The Feminist Research Group, Regina

It is the responsibility of the religious community to speak out against the human degradation that is part of prostitution and street soliciting. The effects on attitudes toward sexuality, relationships and community...[are] devastating.
Group of Clergy, Vancouver

3. Causes of Prostitution

3.1 Introduction

The issue of what causes prostitution produced many theories and opinions, almost all of them from women's groups. With one or two exceptions, the community associations, police and civic leaders who were anxious to force prostitutes from the streets of their cities, said very little when it came to a discussion of the root causes of the phenomenon of prostitution.

Most of the women's groups believed that women's involvement in prostitution was primarily the result of the desperate economic plight in which many women find themselves. They also attributed prostitution to the socialization of women who are brought up to believe that their bodies are their only valued asset. The National Action Committee on the Status of Women pointed out that "the selling of our bodies does not take place only in Vancouver's West End or other strips. It takes place [in various media] all across Canada every day."

Several groups also cited new sociological research, particularly from the United States, which is finding a correlation between incest and sexual assault of young girls and their later involvement in prostitution. The use of drugs, the fact of having run away from home (sometimes to escape abuse), and the prevalence of pornography were also blamed for the increase in prostitution.

> The true causes of prostitution are social and economic and it is only through social and economic change that the prostitution problem can be solved... Women do not want to sell their bodies. For the most part, women enter prostitution because they have learned that their bodies are saleable commodities and feel they have nothing else to offer...
> *National Action Committee on the Status of Women, Toronto*

> [Prostitution and soliciting] must be understood as stemming from both short-run and long-run causes. A society that continues to define women as sexual objects and allows men to act as if women are fit to be the recipients of male aggression cannot be surprised when women accept that definition of themselves and market themselves as a commodity when their other limited economic resources fail.
>
> The shorter-term cause is that in times of high unemployment, hard economic times, and increasing social pressures, many women must earn money any way they can.
>
> [In both analyses, however, the fact that] society has labelled one party to the transaction as 'bad' and 'criminal' and the other party as entering an economic transaction for the provision of services in a legitimate way is indefensible rationally, logically or morally.
> *The Elizabeth Fry Society of Kingston*

> ...pornography and prostitution are symptoms and particularly graphic symbols of oppression and objectification of women in our society, revealing the violence directed towards women and the merchandising of that violence. Pornography and prostitution are institutions which reinforce and mirror the daily abuse of women by men. This daily abuse of women takes many forms such as rape, battering and harassment. But this abuse and bullying is not

> only perpetuated by individual men; in the areas of reproductive choice, family-law and economic inequities in the workplace, the subservience of women to men is sanctioned and institutionalized, by governments, businesses and religious organizations. These institutions further contribute to the cheapening and devaluing of women's labour in society.... It is clear that it is men who are to blame for the institutions of pornography and prostitution...
> *Men Against Sexism, Winnipeg*

> [Prostitution] is a form of domination and nothing else. The existence of both pornography and prostitution depends on the availability of a population of disadvantaged women. If women were not disadvantaged, if they had true equality under the law, if they had proper access to education, and training, if they had access to experiences which build self-esteem, it would not be possible for either of these things to take place...
> *Le Comité de la Protection de la Jeunesse, Montréal*

3.2 Sexual Abuse and Incest

Many of the social work organizations which work with prostitutes reported to the Committee that they are finding that many prostitutes were sexually abused as children. (See Part IV on Children for a discussion of this view). The Elizabeth Fry Society of Kingston, for example, estimates that one third of the women in the federal penitentiary were sexually abused as children. The Children's Home of Winnipeg, which works with troubled children, told the Committee that up to 80 percent of the young people in one of their training programs were sexually abused as youngsters.

> As we delved into the literature in the area, we discovered....that our observations were consistent with experts in the field who have acknowledged that teenage prostitution is a point on a continuum of an early destructive sexual experience. One recent case in which we were involved was that of a young woman who used to obtain her allowance for performing fellatio on her father; for her it was a natural progression to move on to other forms of selling sex.
> *The Children's Home of Winnipeg*

> The association of child abuse with prostitution appears to be gaining increased recognition by researchers. In one recent study, detailed life histories were collected on 200 prostitutes. Former prostitutes working with Delancy Street Foundation, a self-help residential facility known for its work with prostitutes, criminals and drug addicts, conducted this survey. Their results clearly link abuse as juveniles and prostitution as adults. This particular study found that:
>
> 60 per cent of the prostitutes became so when 16 or younger; the youngest was a mere child of 10;
>
> 65 per cent came from families of middle or higher income;
>
> 60 per cent had been sexually exploited as juveniles; in 63 per cent of the cases, the abuser had been the father or surrogate father;
>
> only 10 per cent had been abused by strangers;
>
> in 81 per cent of the cases, some sort of force was used and almost all reported that the sexual abuse caused severe physical harm: cuts, bruises, broken bones, venereal disease;

> 17 per cent ran away from home to avoid the abuse; and
>
> 2 per cent had attempted to commit suicide.
>
> *Government of Saskatchewan, Regina*

3.3 Economic Conditions

The economic plight of women, particularly young, poorly educated women who are unable to find employment, was cited by many groups as the major cause of prostitution. They pointed out that in times of economic hardship and high unemployment, those who lack schooling, training or work experience may have no choice but to turn to prostitution to provide the basic necessities for themselves and their dependents. They also pointed out that Canadian women earn, on average, 60 cents for every dollar earned by men. Their low income is even more graphically illustrated by the fact that in 1981, 75 per cent of all minimum wage earners were women.

> Prostitution [must] be understood as a crime of poverty. As long as there is demand for purchasable sex, and a combination of high unemployment and low-paying jobs, we should realize the prostitutes are driven by hunger and frustration to fill the supply of that demand.
> *Concordia [University] Women's Collective, Montréal*

> The recent increase in street prostitution in the Halifax Metro area directly corresponds to the downturn in the economy, the increase in exhausted rates of Unemployment Insurance, and restraints and tightening up of welfare budgets. This correlation is extremely important.
> *Nova Scotia Association of Social Workers, Halifax*

> In Regina the majority of street walkers are young native teenage women, one of the groups with the highest unemployment rates in the country.
> *The Feminist Research Group, Regina*

The Ontario Advisory Council on the Status of Women emphasized the need for economic reforms to alleviate the problem of women and girls turning to prostitution because they have few other available options. Their recommendations, designed to improve the economic status of all women in our society, encourage both federal and provincial governments to introduce:

1) legislated affirmative action programs;
2) contract compliance;
3) better enforcement of the employment standards legislation;
4) improved child care facilities;
5) re-training programs for women to assist them to enter the higher paying non-traditional jobs;
6) extension of benefits to part-time workers on a pro-rated basis with full-time workers;
7) changes to social benefits legislation in order to allow women to adequately support their families.

3.4 Other Causes

Three other causes of prostitution which were mentioned at the public hearings were the problems of runaways who fall into prostitution as a last resort, the use of drugs and the effect of pornography. It was pointed out that large urban cities have become refuges for thousands of homeless people, many of whom are juveniles escaping from abusive families or provincial juvenile homes.

> While one researcher documented that 96 percent of teenage prostitutes were runaways, this phenomenon is often mistakenly assumed to be the problem, when actually it is largely a symptom of a pattern of victimization which begins for most prostitutes when they are young children at home.
> *Faculty of Law Students, University of Western Ontario, London*

> Three quarters of juvenile prostitutes interviewed at Kingston Penitentiary were escaping from families which subjected them to sexual abuse.
> *The Elizabeth Fry Society of Kingston*

While no statistics on drug use and addiction by prostitutes were available, some social workers and civic officials described the use of drugs by prostitutes as being much higher than for the population as a whole. On the other hand, the Committee was told in a private meeting with prostitutes in one major city that some prostitutes use drugs and alcohol to help them to endure their work, but that the majority do not because the dangers of their job require that they be constantly alert.

Pornography was also cited by some as a cause or a contributor to prostitution. The prevalence of pornography reinforces the view that women are sexual objects available for men's pleasure. Others believe that for the consumer of pornography, the prostitute is the most available person to engage in the sexual acts portrayed in pornography. One promises, the other delivers.

4. The Present Law and its Enforcement

4.1 The Law

The public hearings revealed that there are two distinct, and diametrically opposed, schools of thought regarding the present law on prostitution. On one side, one tends to find the police, mayors, municipal officials and community groups representing areas affected by prostitution, as well as conservative church groups. On the other are organizations such as women's groups, civil liberties associations, social workers, some churches and gay organizations.

On the basis of the briefs presented to the Committee, it would appear that the first group is convinced that the only solution to the problem of street prostitution is the introduction of stronger federal laws, similar to those proposed by the Standing Committee on Justice and Legal Affairs in 1983, but with a wider definition of street soliciting. Briefs from the second group indicate that the present laws, both in their substance and in their administration, have been unfair and unworkable because they have had the effect of punishing the prostitute and not the customer. In addition, they believe that these laws discriminate chiefly against street prostitutes, who tend to be poor, disadvantaged, and from visible minorities. These groups believe that the only solution to the problem of prostitution has to be a long-range one, based on social and economic programs designed to keep young people out of prostitution, rather than harsher laws to punish those already in it. They tended to favour decriminalization of prostitution.

Some examples of the views of the first group, who favour stronger controls, follow:

> To put an end to the problems caused by prostitution and to allow citizens to move about freely in the streets of Canada as a whole, the Criminal Code must define the notion of solicitation as any person who through words, gestures or otherwise offers oneself, proposes oneself or in any way demonstrates that he or she is available for purposes of prostitution.
> *Service de Police de la Communauté Urbaine de Montréal*

> ...whatever changes are made to the Criminal Code, it should be amended to remove the uncertainty as to whether clients are liable to prosecution.
>
> ...a new offence [should] be added consisting of the offering or acceptance of an offer to engage in prostitution in a public place...
>
> ...the definition of public place [should] be amended to include vehicles in public places, and private places open to public view.
> *Mayor Ron Wallace, Halifax*

> [The Hutt decision] has virtually rendered the existing [soliciting] legislation useless...[Now] a police officer must virtually witness a prostitute 'putting a half nelson on' or 'wrestling a client to the ground' in order to obtain a conviction. Consequently, local police have laid but one soliciting charge in the past two years and it was then thrown out of court.
> *Patrick Cummings, Acting Mayor, Niagara Falls*

The proposals, made by women's groups and civil liberties associations, that other laws, such as those designed to control nuisance, traffic, and noise, could be used to prevent the most disturbing aspects of street prostitution, were dismissed as unworkable by police and many community groups.

> Evidence required for the enforcement of Sections 171 (creating a disturbance) and 193 (keeping a bawdy house) are so onerous as to make them virtually useless. ...while the potential of indirect controls exists, the reality, as seen in inner-city communities, is that they have not been or cannot be effectively used.
> *West End Community Advisory Council, Vancouver*

> ...increased police foot patrols in the North Jarvis area and the study of possible traffic modifications to deter customers, can only curtail street soliciting a small degree, and for only a short term.
> *Mayor Art Eggleton, Toronto*

> ...[these] regulations are stop gap measures that add to the inconvenience of citizens in the affected neighbourhoods; the only solution is the adoption of the Justice Committee amendments.
> *Toronto Residents on Street Soliciting*

The views of the women's groups, civil liberties associations and gay groups were diametrically opposed to those of the civic officials and community groups.

> The supposed legal activity of prostitution is indirectly criminalized because of the effect of Sections 193 [bawdy houses] and 195 [living on the avails]. In the case of the soliciting section, a further effect is to protect men from the undue solicitations of women...[while] women receive no such equivalent protection from unwelcome and persistent solicitations, nor is society at large protected from the solicitations of politicians, street hawkers, religious advocates or others plying their wares. Section 195.1 [soliciting] is clearly discriminatory and criminalizes the behaviour of only one group of people who solicit, prostitutes who work the street.
>
> In more serious nuisance cases, other Criminal Code provisions such as causing a disturbance, indecent exposure, or intimidation, could be utilized instead of the soliciting section.
> *Vancouver Status of Women, Vancouver*

> ...increased use of Section 169 (causing a disturbance), and Section 171 (public indecency) [could be used] to counter prostitution-related crime.
> *B.C. Civil Liberties Association, Vancouver*

> [The] present law deprives the prostitute of husband or mate and stable family life; any man living with a prostitute can be charged with 'living on the avails'... Bawdy house laws force her to work on the run.
> *Canadian Organization for the Rights of Prostitutes, Toronto*

> The debate on amending the Criminal Code dealing with prostitution centers on two issues: the right of adult gays to have sex in gay institutions such as steambaths, and the provision of sexual services for financial reward. At present, the criminalization of gay prostitutes under the bawdy house sections is used by the police to harass gays and reinforce the prevailing social mores of stigmatizing and persecuting gays.
> *Right to Privacy Committee, Toronto*

4.2 Police Practices

Police practices with regard to the enforcement of laws against prostitution came under attack from two different directions. First, police were criticized by aldermen in some cities for their failure (since the Hutt decision requiring pressing and persistent behaviour made it more difficult to arrest prostitutes) to use other laws to curtail the activities of street prostitutes. Secondly, they were criticized by women's groups for their harassment of prostitutes.

> ...police will not increase foot patrols, which in the past substantially reduced the problem of street soliciting, because of their inability to obtain arrests; an attitude that appears to be part of a stratagem to obtain the passage of the tougher Criminal Code amendments.
> *Alderman Jack Layton, Toronto*

> If the spirit is there, the police could control many of the public nuisance factors under the current legislation.
> *Elizabeth Fry Society of Toronto*

> There has been a great public campaign by the police and the prosecutors to obtain new anti-prostitution laws by not enforcing the existing statutes.
> *Alderman Harry Rankin, Vancouver*

The harassment of prostitutes by police was described in some of the briefs from women's groups.

> The criminalization of solicitation for the purposes of prostitution is a difficult offence for the police to charge, and yet they are expected to deal with it. This can, and does, allow for harassment of women who work as prostitutes by the police. For example, in Winnipeg, open and surreptitious photographic surveillance of the women is done routinely by the police. Common tactics reported are frequent drug searches without warrants, being taken off the street and held for questioning, etc.
>
> There is no special training for police officers who work in this area. They learn 'on the job', and they are picked for their ability to have a 'good rapport with the girls'. So it is not surprising the unenlightened attitude of law enforcement officers towards women on the street.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

> Perhaps many of the problems surrounding prostitution, such as physical and psychological harassment by police, may be the result of the law.
> *Manitoba Advisory Council on the Status of Women, Winnipeg*

> Enforcement of existing legislation has proved troublesome, costly in money and police personnel, prosecution efforts and court attention and ineffective in deterring recidivism. Furthermore, enforcement patterns are often selective and discriminatory. The use of undercover agents posing as prostitutes or clients is questionable and tends to bring the administration of justice into disrepute.
> *Association Nationale de la Femme et le Droit, Montréal*

5. Recommendations for Change

5.1 The Law

The recommendations for changes to the law fall into four categories, which are described in detail in Chapter 36. This section will attempt to provide only a cross-section of the views expressed at the public hearings.

The four categories of changes proposed to the Committee were:

a) The criminal law should be strengthened in an effort to control street prostitution more effectively, or, in the view of a small minority, to do away entirely with prostitution of all types;

b) Prostitution-related activities should be decriminalized, that is removed from the control of the criminal law, unless other forms of criminal conduct are involved;

c) Prostitution should be legalized and controlled by regulation;

d) The prostitution activities of prostitutes should be decriminalized, but those of customers and pimps should be criminalized, a blending of criminalization and decriminalization.

a) Strengthen the Present Law

The majority of those who believed that stronger laws were the solution to the problem wanted to make it possible for the police to control street prostitution more effectively and to secure convictions more easily. This view was put forward by the police in most cities, as well as by mayors and councils, community and commercial groups and individuals in major cities in which street prostitution was creating problems. These groups supported the 1983 recommendations of the House of Commons Standing Committee on Justice and Legal Affairs which recommended: the addition of a new offence of offering or accepting an offer to engage in prostitution; the application of the law to both prostitute and customer; and the redefinition of "public place" to include a motor vehicle in a public place.

> In any amendments to the *Criminal Code* it [must] be made abundantly clear that if any person solicits any other person in a public place for the purposes of prostitution in any manner that person is guilty of an offence.
> *Calgary Police Commission, Calgary*

> Section 195.1 [soliciting] must be amended to overcome the pressing and persistent problem. The amendments proposed by the Justice Committee will be unenforceable while police are still left with the need to prove that solicitation is "pressing and persistent."
> *Mayor Art Eggleton, Toronto*

The extreme view, that prostitution should be eliminated entirely, was held by only a very small proportion of those making submissions.

> The government should pass laws prohibiting the practice of prostitution in any form.
> *Christian and Missionary Alliance of Churches, Regina*

> ...favours criminalizing all forms of prostitution, as well as all associated activities. To meet this objective, the Hutt decision should be specifically overruled by provisions of the Criminal Code; clients of prostitutes should be made equally liable to prosecution; ... consideration should be given to including private places as well as public places in any prohibition on soliciting.
> *REAL Women of Canada, Toronto*

b) Decriminalize Prostitution

The proposal that prostitution should be decriminalized was made by the majority of women's groups which presented briefs on prostitution, by individual prostitutes and prostitute organizations, gay rights organizations, social workers, civil liberties organizations, some church groups and a small minority of municipal politicians.

These briefs advocated: the removal of street soliciting from the *Criminal Code*; the repeal of the common bawdy house provisions, or at least changing them to allow small numbers of prostitutes to work out of their own premises; and the use of other *Criminal Code* provisions, along with provincial legislation and municipal by-laws to deal with the nuisances associated with street prostitution.

Those who favoured decriminalization of prostitution told the Committee that prostitutes are essentially victims of a sexist society, and should not be treated as criminals. Although they did not condone prostitution as a way of life, they believed that it could be eliminated only through long-term social and economic measures, not through legal restraints.

> Given that no legal changes, in and of themselves, can eliminate prostitution, decriminalization seems to afford the fairest, least costly and most effective choice, and to offer the most opportunity for options for prostitute women.
>
> Prostitution, like water, can be dammed in one place, but will simply find another outlet. Prostitution may chang[illegible]n but it will not disappear so long as society creates and fosters cond[illegible]where it must prevail."
> *National Action Committee on the Stat[illegible]Women, Toronto*

The National Action Committee on the Status of Women, Toronto, made a detailed proposal outlining how the law should be changed to decriminalize prostitution. Similar proposals were put forward by the B.C. Civil Liberties Association and by regional women's groups such as the Manitoba Action Committee on the Status of Women, the Vancouver Status of Women, and the Feminist Research Group, Regina. The NAC proposals are:

> 1. Section 195.1 of the *Criminal Code*, Soliciting for the Purposes of Prostitution, ought to be repealed.
> 2. In the alternative, Section 195.1 ought not to be amended with a view to cancelling the effect of Hutt. It is doubtful, and we doubt, that soliciting which is pressing and persistent is sufficiently harmful to properly constitute a crime; however, it is clear that soliciting which is not pressing and persistent is not sufficiently harmful, and should not constitute an offence.
> 3. Section 193, Keeping a Common Bawdy House, ought to be repealed. Alternatively, S. 193 should be amended to make it possible for prostitutes to use their own homes for the purposes of prostitution.
> 4. The problems raised by the phenomenon of street prostitution, insofar as they would remain if recommendation 3 were adopted, should be regarded as problems of public order. They are properly dealt with by legal remedies other than criminal sanctions aimed specifically and exclusively at the prostitutes. For example, police and concerned citizens should be urged to make use of the following types of legislation:
>   (a) Existing provincial residential tenancy legislation which protects the right to quiet enjoyment of one's residential premises. In the event that Section 193 is repealed, this legislation, along with well developed common law, is available to deal with any nuisances arising from the operation of bawdy houses.
>   (b) Motor vehicle legislation, municipal zoning by-laws and similar regulatory legislative controls can be used to control any nuisance problems resulting from street prostitution.
>   (c) Insofar as serious nuisance problems that amount to criminal behaviour manifest themselves, enforcement of existing sections of the *Criminal Code* can be relied upon. Specifically, Section 171 (Causing a Disturbance, Indecent Exhibition, Loitering, etc...), Section 169 (Indecent Acts), Section 305 (Extortion), and Section 381 (Intimidation) could be used.
>
> *National Action Committee on the Status of Women, Toronto*

The Canadian Advisory Council on the Status of Women put forward a slightly different proposal which recommends a form of partial decriminalization of selected prostitution-related offences while retaining sanctions against all offensive solicitors. The Council recommends the abolition of the present 'soliciting' provision in s. 195.1 of the *Criminal Code* and its replacement with a new offence wherein the pressing or persistent solicitations of anyone, for *whatever purpose* in a public place, would be liable to penalty.

The Council also proposed that the definition of a common bawdy house in s. 179 of the *Criminal Code* be amended to allow up to three persons to use premises for the purpose of their own prostitution.

The decriminalization option was also the most popular with organized groups of prostitutes, Alliance for the Safety of Prostitutes in Vancouver and the Canadian Organization for the Rights of Prostitutes in Toronto.

> The [decriminalization] option represents the only viable and socially just alternative. It would allow women:
>
> - the option of working indoors and ... methods [other than street soliciting] of securing business, alleviating much of the existing problems on the street;
> - increased security for the prostitutes by reducing the potential for exploitation by customer, police and pimp;
> - a sense of dignity and self worth.
>
> *Canadian Organization for the Rights of Prostitutes, Toronto*

Gay groups presenting briefs in several cities also supported the decriminalization of prostitution, especially the bawdy house sections.

> We wish to comment only on a few aspects of the issues of prostitution, pending a full study of this very complex subject. Since the decriminalization of consensual sodomy between two adults, bawdy-house statutes, along with obscenity statutes, have provided the most common legal pretexts to police and the courts for the politically motivated persecution of gay people. Indeed, they have replaced the sodomy statutes as the legislative means of criminalization of gay people, and been used systematically against gay institutions, meeting-places, and even private homes, where no monetary transactions were ever proven to have taken place.
>
> We demand the immediate repeal of all bawdy-house statutes that may be interpreted to apply to any situation other than strictly defined prostitution. Furthermore, we demand the removal of the categories of "gross indecency" and "buggery" from the *Criminal Code*, undefined terms which are systematically defined by the police and our other political enemies in such a way as to selectively prosecute gay people and criminalize our valid sexual practices.
>
> Finally, in view of recent tendencies of the law to invade our private space and criminalize our lives by extending the definition of public space, we urge the commission to consider the proposed definition of automobiles as public space with extreme caution. If approved this revision will be used selectively by police as one more means to criminalize our private lives as gay people: heterosexual teenagers parked in "lovers' lanes" will continue unimpeded as

before, while the gay equivalents will continue to be subjected to the full force of legal terrorism with increased legislative justification.
Emergency Committee of Gay Cultural Workers Against Obscenity Laws, Montréal

Those opposed to decriminalization predicted dire consequences if such a change were introduced.

> If this option were chosen... thereafter the downtown streets of major Canadian cities would be literally clogged with prostitutes from all over North America lured to Canada by the lax laws. Decriminalization would, in effect, be a giveaway of our downtown areas over to the prostitutes and their pimps.
> *Mayor Art Eggleton, Toronto*

> ...this option [decriminalization] exists now. Simple soliciting is not a criminal act, and those who argue for decriminalization are simply arguing for maintaining the present unpleasant situation.
> *Downtown Halifax Residents Association, Halifax*

c) Legalize Prostitution

The view that prostitution should be legalized and regulated was presented to the Committee by only a few individuals, including a few municipal politicians. Some wanted licensed brothels, and licensing and compulsory medical examinations of prostitutes. Others suggested red light districts.

> Legalization, with appropriate control mechanisms, would be a better situation than we have today... Then maybe we can start to discuss the control mechanisms, the zoning, the licensing, the income taxes, the hours of operation, the age limits, the types of sexual services that are authorized for sale, and all of the other governmental controls that are involved with 'legalized prostitution.' Legalization does not mean uncontrolled prostitution, as the prostitutes would like to have.
> *Downtown Halifax Residents Association, Halifax*

> I firmly believe that controlling prostitution and allowing it to proceed within the framework of strict regulation is the only way to eliminate its harmful and unpleasant effects. [However], I do not believe that establishing "red-light districts" will solve the problem. European cities which have done this are experiencing very high levels of criminal activities in these areas.
>
> I do believe, however, that by limiting the number of licences issued, by allowing business operators to accept or refuse an application by a prostitute to operate on their premises, and by allowing prostitutes to work in all areas zoned exclusively for commercial use, we can prevent a high concentration of this kind of activity in any one area.
>
> The licensing provision would enable law enforcement officials to get many of the young prostitutes off the streets and place them in the care of juvenile authorities, where they may receive medical attention, [and] counselling...
> *Alderman Anne Johnston, Toronto*

While there were only a few suggestions for legalization of prostitution, many presenters expressed strong opposition to the imposition of any such regime. Mayors and community associations, as well as women's groups and the prostitutes themselves were all opposed to legalization.

> ...the state would, in effect, become the pimp and benefit, through taxes, from an activity that is regarded by many in our society as exploitative of women. There are also some practical drawbacks to legalization. It has been suggested that only a certain number of licensed prostitutes be allowed to solicit on designated streets...or that a red light district be created... There would be an immediate outcry from residents and businesses, "not on my street!"
> *Mayor Art Eggleton, Toronto*

> ...legalization raises three problems. First, politicians are seen to condone prostitution; secondly, the government becomes the pimp; and thirdly, it retains prohibitions and a system of enforcement that duplicates the current provisions of the *Criminal Code* in order to control 'free-lancers'.
> *West End Community Advisory Council, Vancouver*

> ...by licensing, you would be ensuring that the most vulnerable, the young, would be put in the hands of the pimps and the underworld.
> *Elizabeth Fry Society of Toronto*

> The real disadvantage of legalization would be the danger of enslavement and ghettoization of prostitutes through their being registered.
> *First United Church, Vancouver*

d) Penalize only the Customer

The proposal that the law should penalize the customers, pimps and procurers, but decriminalize the behaviour of the prostitutes was made by Professor Constance Backhouse and a group of law students at the University of Western Ontario, London. This view was supported by some women's groups as well.

The law students made three proposals for reforming the *Criminal Code*: that a partial decriminalization approach be taken that would repeal the existing sections used against prostitutes; that criminal sanctions against exploiters be tightened; and that emphasis be put on the client's offer to purchase sexual services. It also proposed that the bawdy house sections should be amended to deal solely with keepers and owners, not inmates or found-ins, in order to deter those who profit from the prostitution of other persons.

Their argument is that prostitution should not be accepted without question. The law should attempt to deal with the root cause, which is the demand by men for sexual services. It is this male attitude which creates the need for prostitutes and the situation which allows other males, in particular the procurers and pimps, to exploit them.

The major criticism of this approach, which would create a law which distinguishes between buyers (almost entirely men) and sellers (mostly women) of sexual services, is the possibility that it would be open to a challenge under the equality provisions (Section 15) of the Charter of Rights.

6. Rehabilitation Programs

The groups which addressed the need for rehabilitation programs to prevent women from entering prostitution, and to assist those in the field to find other means of employment held the belief that the present social and economic inequalities of women in our society are responsible for driving disadvantaged women into prostitution. They pointed out that the government, if it is truly committed to reducing solicitation, must look at the conditions that lead women into prostitution and at the nature of our society which perceives women as sexual objects to be bought and sold.

They took the position that the root causes of prostitution could be eradicated if the social and economic inequalities faced by women were addressed. They urged the provision of improved services for women, such as interval houses, community living alternatives, 24-hour day care centres, employment and career counselling and training, drug and alcohol counselling, the implementation of affirmative action programs and the enforcement of equal pay for work of equal value regulations.

> Economic independence is the key to resolving the problem of prostitution, as it is the key to resolving most of the issues taken up by feminists: child care, women's wages and job ghettos, discrimination and devaluation. Prostitution is but one symptom of the pervasive inequalities condoned by our society vis-à-vis women and children.
> *Saskatoon Committee Against Pornography, Saskatoon*

> Until women have equality of opportunity and treatment, there will be those who endure the censure, arrest, harassment and punishment of prostitution in order to make a living wage. For those who are already involved in prostitution we must provide services in re-training, life skills and assertiveness training, and affirmative action in all areas.
> *Manitoba Advisory Council on the Status of Women, Winnipeg*

> It may or may not be possible to prevent prostitution, but it should certainly be possible to make alternatives more possible to women and children. Services to abused or distressed women and children are "under the gun" at this time, just when the problem of these groups is being addressed.
> *First United Church, Vancouver*

> If we are to resolve the prostitution problem, we must begin by preventing child abuse, by refusing to condone the use of women's bodies as a sales incentive in advertising and their abuse in violent pornography, by providing alternatives to children and women now involved in prostitution in the form of alternative housing arrangements, social services and employment training programs.
> *National Action Committee on the Status of Women, Toronto*

The most detailed proposals for services which would help women to get out of prostitution and assist those now in it were made by the Alliance for the Safety of Prostitutes in Vancouver. They proposed:

1. Drop-in store front centres should be set up to provide health care, family planning information, legal services, court advocacy and welfare appeals.
2. The incidence of prostitution could be reduced if some or all of the following services were available to ease the financial burden for single women and sole support mothers:

> - day care, so that single parent prostitutes could get a regular job;
> - student grants to allow prostitutes to improve their education or job skills;
> - co-operative housing, to reduce the cost of living for single parents or single women;
> - an increase in welfare payments so that welfare women would not have to resort to prostitution on the last few days before their next cheque arrives;
> - an increase in the minimum wage so that low income women would not have to resort to prostitution to make ends meet;
> - special training for social workers and police who do not presently know how to deal with prostitutes.
>
> *Alliance for the Safety of Prostitutes, Vancouver*

7. Research

Many groups commented on the fact that research on the subject of prostitution is almost non-existent in Canada, and that the little that has been done has concentrated almost entirely on street prostitution. Very little is known about the other types of prostitution, such as call-girls, escort services and massage parlours. Even less is known about the customers of prostitutes.

> ...a thorough and professional study [should] be undertaken to uncover the roots of prostitution and to document to what extent the economic plight of young women and sexual exploitation of children play substantial roles in leading women into prostitution.
> *Manitoba Action Committee on the Status of Women, Winnipeg*

> ...the federal government should allocate a sum of money for an in-depth, national study of the needs of prostitutes. Such a study must include such aspects as: the involuntary or voluntary nature of their participation; reasons for participation, if voluntary; perceived needs vis-à-vis safety, medical services, etc.; ...and ways of aiding, through training programs, employment opportunities, etc. those who wish to leave the field.
> *The Feminist Research Group, Regina*

8. Conclusion

The public hearings were a very important aspect of the work of the Special Committee. The careful and thoughtful briefs, presented by groups and individuals in every region of Canada and representing a wide diversity of opinion, were an invaluable contribution to the body of information the Committee collected on this issue. In conclusion, the Committee would like to thank all of the participants who devoted many hours of their time to writing their briefs, presenting their views and participating in the development of legal and social reform.

Chapter 28

Prostitution in Canada Today

1. Introduction

Briefs presented at the public hearings were an invaluable source of information about Canadians' views and experiences with prostitution activities. Many presentations included information about prostitution in particular cities and towns and made reference to research studies. In this chapter, we will consider in more detail what published studies say about prostitution so that our subsequent recommendations are based on as comprehensive a view of the issue as is possible.

Historical and empirical information about prostitution in Canada is largely absent from the available research literature. Perhaps the major reason for this state of affairs is that only recently have researchers turned their attention to the study of this issue. When they do begin to investigate the context and manifestations of prostitution, they realize that the research area is a very difficult one. Not surprisingly, therefore, our information is relatively incomplete. While we do find the occasional study or reference to prostitution in Canada, only rarely do we have multiple or comparable studies such that the information reported in one source can be checked against another set of findings, and thus we can be confident that we have a reliable body of information.[1]

This lack of good, comprehensive research does not mean, of course, that people have been unaware of the business of prostitution or that people do not have firmly held views about the profession, and its causes and consequences. Indeed, one can see in the history of legislation which has been passed to control prostitution, that certain views and ideas about it are reflected in changes to the legal codes. However, these changes do not necessarily mean that people and politicians had a thorough or accurate understanding of the issues with which they were dealing. Rather, a partial knowledge, coupled with periodic waves of moral fervour, convinced various Parliaments to take action.[2]

In the 1980s, it is our belief that policy makers, politicians and the general public look for a more complete understanding of social issues before implementing or changing legislation. While previous generations may have striven for this goal as well, the means to accomplish this end are more available to us now, and the possibilities for conducting research into an issue as difficult and complex as prostitution have increased. The accuracy of information may also be perhaps, more significant to us today, given the involvement of the state in all aspects of our lives. If the state is to set so many of the parameters within which we will live, then we must be sure that the principles and bases from which action is taken, are ones with which Canadians agree and ones which are legitimate and defensible.

Typically, we believe that unless we understand the phenomenon we are seeking to control, our efforts towards that end will not be overly successful. For example, we must have a good understanding of the harms, if any, resulting from prostitution as it currently operates before we can determine what action may be necessary. Similarly, when we seek to implement social policies, we will be more successful if they are specifically targeted at certain categories of people. This again assumes that we know the characteristics and number of people involved in the issues we seek to address, otherwise our policies may be inappropriate and special facilities over- or under-utilized.

Part of the task of the Committee, therefore, has been to gain as full an understanding of the business of prostitution as is possible. As indicated earlier, most people have views about the issue, but may not be very clear about the basis for their views, and certainly have varying degrees of knowledge based on personal experiences. Through its public hearings, the Committee received submissions from a variety of Canadians who had information to bring to our attention.

This information typically came from people who had had direct contact with prostitution either as members of the public who were inconvenienced by the business, as members of the various professions who from time to time had prostitutes as clients or as members of police forces. In addition, the Committee held private meetings with them whenever prostitutes requested the opportunity to present their views in private. The Committee also heard from people who, although they may not have had any direct contact with prostitution, had specific beliefs about it.

While briefs, submissions and interviews from concerned individuals and groups constituted one source of information for the Committee, an additional source was the program of research undertaken by the Department of Justice, which was designed to assist the Committee in its deliberations. There were three major components to the research on prostitution: 1) five regional studies, 2) a national population survey, and 3) a review of prostitution and its control in selected countries outside Canada.

The five regional studies were undertaken in order to learn as much as possible about who the prostitutes are and how they work, current control practices, social programs and the need for changes in our current legislation. The regional studies were conducted in Vancouver, the Prairie provinces (essentially Winnipeg, Saskatoon and Calgary), Ontario (primarily Toronto but with some information from Niagara Falls, London, Timmins, Sudbury, Hamilton, Ottawa, Windsor and Cornwall), the province of Québec (focusing on Québec City, Montréal and Trois-Rivières) and the Atlantic region (with Halifax and St. John's being the focus).[3] The researchers were operating under very tight schedules since the Committee needed the information as quickly as possible for its deliberations. The shortness of time was particularly problematic for research such as this, since the quasi-legality of the business means that researchers have to establish their credibility and reliability with those involved before people are willing to talk about what they do. Establishing this credibility, of course, takes time. For these reasons, the researchers could not cover all aspects of prostitution, but had to concentrate their efforts on certain aspects of the business. Because of public concern about the most visible aspects of prostitution, the researchers were asked to focus on prostitution which is carried out on the street and in public places, and to do all they could to investigate the other forms of the business. In addition, the researchers were to concentrate, if possible, on the customers (who they are and their motivations) and those who procure and maintain people in the profession (i.e. pimps). Although we now have more information about prostitution in Canada than we have ever had before, it must be stressed that we still know about only certain parts of the business and, as will be apparent in the discussion of the research findings, there are whole areas about which we still know virtually nothing.

The second component of the Department of Justice's research program was the National Population Study on Pornography and Prostitution.[4] This survey included 2,018 Canadians over 18 years of age who were interviewed during June and July, 1984 on the issues of pornography and prostitution. Because the sample is representative of Canadians over 18 years of age, and in all parts of the country with the exception of the Yukon and Northwest Territories, we are able to draw conclusions about Canadians' knowledge of prostitution, their attitudes towards it, and similar issues of interest. The study was designed to learn about "Canadians attitudes towards, knowledge and perceptions of pornography and prostitution."[5] This is the first time that such a large-scale study has been conducted in Canada. While the study has given the Committee some interesting information on Canadians' views, use and exposure to pornography and prostitution, it should be remembered that this is the first such foray into this area of research, and everyone involved with it would do it somewhat differently if the study were to be repeated. For example, questions would be reworded and some of the conceptualization on which the survey is based requires further thought and elaboration. In addition, it must be stressed that social surveys such as this can give us only a very partial and somewhat superficial understanding of the issues with which we are concerned. Constraints on the time it takes respondents to answer the questions mean that each facet of the topic cannot be pursued in depth. Therefore, very complex issues are simplified and respondents may be answering questions on issues to which they have given very little thought, and to which they would give different answers if they were to reflect more thoroughly on their own views and attitudes. The National Population Survey should, therefore, be seen as a good, first effort to explore Canadian's perceptions about pornography and prostitution, but not as a definitive statement on the issues. As will be discussed later in the Report, it gives us more descriptive information about Canadians' views on the issues than we have had to date, but still leaves us with many unanswered questions which need to be the subject of further research.

A final set of studies looks at prostitution in other countries.[6] The research involved an analysis of the current legislation, published studies discussing aspects of prostitution or the public's views for the country in question, and interviews with selected officials whenever this was possible. Although such research does not provide the detail given in the five regional studies it is invaluable in indicating the trends in legislation and the major advantages or disadvantages to particular approaches of the issue.

Apart from these major research initiatives, smaller studies were completed which dealt with specific topics, for example, sexually transmitted diseases and the media coverage of prostitution-related news.[7] The Committee's Director of Legal Research and individual Committee members were also involved in particular aspects of the overall research effort, in relation to such issues as the current state and effectiveness of Canadian criminal law on prostitution-related activities, the relevance of provincial law, municipal by-laws and the impact of the *Charter* on proposed changes to the *Criminal Code*.

Apart from the studies specially commissioned by the Department of Justice or the Committee, we have, of course, made use of published studies and reports whenever possible. As indicated earlier, these are not very numerous when dealing specifically with Canadian experiences, but there is some material available. In particular, the Committee was able to draw on information from the recently published report of the Committee on Sexual Offences Against Children and Youth's (Badgley Report).[8] Although the primary focus of our Committee was on adults, children were included in our mandate and consequently, it was important for us to understand their involvement in prostitution. Other studies gave us some information about prostitution prior to the most recent research in Canada, and studies conducted in other countries provided information which at least allowed us to ask the questions of how and why the Canadian experience would be different from that reported elsewhere. By inference, therefore, we may be able to reach a better understanding of prostitution within the Canadian context.

Although it may be too obvious and trite an observation, we must state that we are not dealing with a new phenomenon in Canadian society. While some may wish to challenge the old cliché that prostitution is the oldest profession, it is apparent that prostitution has been practised in Canada from the time of white contact, and, depending on the precise definition of prostitution, in native societies prior to European settlement.[9]

As Canadian society has changed, however, so has the practice of prostitution. Certainly by the nineteenth century, we find a pattern which is repeated in many western countries of visible street prostitution and known houses of ill-repute often found in conjunction with military establishments and commercial areas, such as ports and frontier settlements.[10] Whether prostitution was also being practised in the smaller towns and rural areas of the country and in less visible forms, is an unanswered question. But the questions and dilemmas about prostitution which we can discuss in the 1980s were certainly familiar to earlier generations of Canadians.

Then, as now, we are asking "How many prostitutes are there?" "How many customers?" "Who becomes a prostitute, and why?" "Why do men use the services of prostitutes?" and "What are the characteristics of these men?" "What are the perceptions of prostitutes about their work and the context in which it takes place?" "Does the public at large have views about the practice of prostitution and its effect on society?" "What should be the response of society to prostitution?" These and similar questions have concerned segments of our society for generations. The work of this Committee is simply the latest attempt to consider these problems in the light of our current situation, but from everything we have learned, it certainly will not be the last.

The remainder of the chapter will present an overview of prostitution in Canada, drawn from information collected at the public hearings and the research studies outlined above.

2. The Incidence of Prostitution

On the basis of the specific research studies conducted for the Department of Justice, and from information given at the public hearings or in private meetings, it is safe to say that prostitution is an identifiable activity in all mid-sized and large cities in Canada, and is certainly not unknown, although perhaps less visible, to the average citizen in smaller cities and towns across the country. On the basis of the National Population Survey, 55% of the respondents were not aware that prostitution was taking place in their community. Thus, although prostitution is a widespread activity in terms of geographical distribution, and as such, has the potential to affect people in each of the provinces and territories, it is by no means a phenomenon with which all Canadians are familiar. The extent to which it does affect people is, of course, related to the actual number of people working as prostitutes and the manner in which they work.

The reliability of estimates about the number of prostitutes in any city is certainly questionable. While it is possible to have some idea of the number of prostitutes on the street at any one time, it is more difficult to know the extent to which the same people are involved in the business over several months and years, and the turnover rates or the movement of people in and out of the profession. It becomes virtually impossible to answer such a straight-forward question as "Are there more prostitutes today than there were 10, 15 or 50 years ago?"

In Montréal, Toronto and Vancouver, for instance, the number of active street prostitutes may vary between 50 and 500, depending on whether only full-time and not part-time prostitutes are included, on the weather, on economic conditions and on police enforcement patterns. Similar fluctuations in figures would be found in all cities where street prostitution occurs. Despite the difficulties of assessing precise numbers, however, there has undoubtedly been an increase in the number of prostitutes working the streets in the past few years in some, though not necessarily all, cities. Whether this represents an increase in total prostitution activities rather than a displacement of prostitutes from private to public areas, and thus a restructuring of the business, is, however, unknown.

The difficulty in answering the question "How many prostitutes are there?" is even more apparent when one considers that street prostitution represents an unknown proportion of all prostitution activities. Some prostitutes work in taverns, bars and lounges, in escort services, massage and body-rub parlours, or advertise that their services are available in private apartments. At this time we have no information and no estimates about the number of people who offer prostitution services in these ways.

In some cities, for example, Fredericton, Saint John and Moncton, non-street forms of prostitution are likely to account for the major part of the business. In other cities, it is apparent that street prostitution is a significant part of the trade, in addition to prostitution provided through other organizational set-ups. Researchers conducting the regional studies in Vancouver and the Atlantic area analysed the advertisements for massage parlours and escort services in the Yellow Pages of Vancouver, Halifax and St. John's. In Halifax and St. John's, the Yellow Pages were analysed from 1925-84. For Vancouver, the study involved both the Yellow Pages and advertisements in selected newspapers, from 1970 onward.

While it has to be remembered that not all advertisements for massage or escort services are fronts for prostitution activities, the increasing explicitness of some advertisements leaves little room for doubt about the exact nature of the services available. Thus, one business has moved from advertising a massage service to a massage hotel service; another advertisement for an escort service shows a couple embracing, bordered by a telephone number which includes the digits "6969"; a third states "All muscles are massaged."[11] There seems little doubt therefore, that off-street prostitution is an important element in the total picture, although we have no information on the numbers of women and men who are engaged in these forms of the business. A reasonable conclusion, however, is that off-street prostitution has increased significantly from the mid-70s onward and may have escalated even more in the past three to four years. Indeed, Lowman suggests that despite the increases in street prostitution in Vancouver, off-street prostitution is likely to have had a higher level of increase, although we have no information on the actual numbers involved.[12]

It is, therefore, extremely difficult to calculate the total number of people in prostitution in any city and the Committee is unable to advance any reliable estimates. The experience of Gordon, writing about Halifax in 1862, is all too familiar:

> According to the Police Returns made some two or three years ago the number of common prostitutes was five hundred. According to an estimate made by a Clergyman at a later date there were six hundred. Afterwards another Clergyman of the City stated, in a public meeting, that there were as many as five hundred, but many thought the statement extravagant. Subsequently, one or two gentlemen of unquestionable authority, who had unusual facilities for ascertaining as nearly as was practicable the actual number, gave, as their opinion, that there were no less than double that number. Then we may put the number of the fallen women of this City at ONE THOUSAND.
>
> In addition to the public, it is undeniable, though not generally known, that there are many private Brothels. Of course the purse-proud and the would-be-thought-to-be-somebody, would not care to meet on common ground Jack Tar and Red Coat.[13]

The difficulties of those attempting to estimate the number of prostitutes in the 1860s are no less real for the researchers of the 1980s. At best, counts of prostitutes on the streets are supplemented by the educated guesses of police, social agencies and other people who have observed the situation over time. Consequently, any assessment of the magnitude of the problem with which we are concerned, at least in relation to the numbers of people offering sexual services, is highly speculative.

3. Characteristics of Prostitutes

Prostitution is overwhelmingly a female occupation. Reports of increases in male homosexual prostitution appear to be reasonably reliable, although not very precise. In terms of adult prostitution, the ratio of female to male prostitutes is estimated to be at least four to one, although there appears to be a variation in this overall figure among cities.

The following account of a young male hustler from the Atlantic region appears to be fairly typical of male prostitutes.

> *Charles*
>
> Charles is a nineteen year old street prostitute, born in New Brunswick and now living in Dartmouth, N.S. He is single and describes himself as bisexual. He does part-time body-work in a garage and lives with his mother, who pays the rent.
>
> His childhood was spent in Dartmouth. He was the second in a family of three children. His father was a vending machine repair man and his mother worked on a fish and chip truck. When he was seven his parents separated and he stayed with his mother.
>
> His strongest childhood memories are of hating school and of his father hitting him with a belt. He ran away from home once but soon returned home

> again. His first sexual experience was oral sex with a girl at school. He was 13 at the time.
>
> His introduction to prostitution was through a friend who was also a "hustler" on the street. Charles was eighteen and made $80.00 from his first transaction.
>
> Some of the hazards he describes on the street are: "fag beaters", loud prostitutes and rude comments by detectives. He would prefer the privacy and convenience of the telephone/escort system of prostitution but says no such service for males exists at this time.
>
> He works two to three hours a night and sees about two customers. He estimates their average age as thirty-five and that most of them are professionals. Though they are married, he feels that they are "closet" homosexuals. Oral sex performed on him by the customer is the most requested act. He will give anal sex but will not receive it. He has also performed unusual requests such as, ejaculating in the customer's face and allowing his body to be squirted with lotions while the customer masturbates.
>
> Charles has been physically assaulted by customers who do not want to pay for extra services, but he himself, has admitted to stealing money and drugs from customers. He does not drink while working in order to be in control. However, he does take drugs after working saying, "I'd live on acid if I could".
>
> He finds the work enjoyable "when the customer is good-looking". He goes to Dartmouth General Hospital for check-ups every two months.
>
> He charges $30.00 for oral sex and $50.00 for anal sex on the customer. A good night's financial intake would be $70.00 which he spends on food, clothing and V.C.R.'s.
>
> He has no criminal record. His contact with the police is limited to rude comments on their part and their telling him to "move on".[14]

Most street prostitutes are in the 18-24 age group. Although juvenile prostitutes are sometimes an identifiable group within a particular location, prostitutes are typically adults. There is also reason to believe that prostitutes working from places other than the streets, are somewhat older and less likely to be juveniles than the street prostitutes. Such a situation seems probable because prostitutes in these circumstances are more likely to be subjected to scrutiny with respect to their age by employers, bar staff or hotel personnel, in order to minimize any potential legal problems for the establishment from which the prostitute is working.

While most prostitutes are adults, it is clear that many of them started in the business as juveniles. While there is evidence that some prostitutes started as young as 10 or 12, this appears to be exceptional and it is more likely that young people engage in the business from the age of 15 or 16 on. Prostitutes' careers on the streets are certainly not long term. For males, their term in the business is typically finished by the time they are in their early 20s as they are no longer competitive with the new and younger hustlers. Women can operate for a longer time, but there is a tendency for women, as they move into their late 20s and 30s to have to take the less desirable work areas. Thus, with increasing age they, too, become less competitive and move down the hierarchy within the profession.

In looking at the social backgrounds of prostitutes, there is no clear pattern which could be considered a predisposing influence on the decision to become a prostitute. Both the Badgley Committee's and the Department of Justice's researchers met prostitutes from all socio-economic levels and from a wide variety of family situations. Nevertheless, there is support for the contention that prostitutes disproportionately come from homes where there are tensions and problems, for example, alcohol and drug abuse and continuous fighting, although these may not be a result of poor economic circumstances or lead to the break-up of the family.

It also appears that street prostitutes are more likely to come from families of relatively low economic means than from the more affluent homes. Whether prostitutes working in other circumstances come from different social backgrounds remains an open question because of our very limited information on this part of the business. The Ontario study does suggest that call-girls may well be somewhat older than the typical street prostitute, more articulate, better educated and likely to have an occupation in addition to prostitution. Such factors may be an indication of social backgrounds which are not as economically disadvantaged as those of street prostitutes.

A further issue relating to the family milieu is the question of sexual abuse of prostitutes as children. Reports from the United States indicate that prostitutes have experienced much higher levels of sexual abuse as children than the population in general.[15] Research in Canada on this issue is considerably more rudimentary and tentative but on the evidence currently available, we would not conclude that the Canadian experience mirrors that of the U.S. The most comprehensive study on this issue is that undertaken by the Badgley Committee.[16]

Results from a national population survey conducted for the Badgley Committee indicate that 53.5% of women respondents and 22.3% of male respondents had been the victims of unwanted sexual acts. These figures appear very high, given that it has usually been assumed that such activities would only be experienced by a very small minority of people. Some child welfare groups and women's associations have agreed, however, that the extent of child sexual abuse is far greater than society has been willing to admit, and these figures certainly support that contention since the majority of victims were between the ages of 12 and 18 years when the unwanted sexual acts occurred. When we conclude, therefore, that prostitutes do not appear to have higher levels of being sexually abused as children, it is not because they are unlikely to have been abused, but because it appears to be such a common phenomenon in our society that the chance of any woman reaching adulthood without being the victim of an unwanted sexual act is approximately one in two. What we do not know, however, is the extent to which prostitutes, as children, may have been the victims of more serious sexual abuse. The figures from the Badgley Report represent a variety of sexual acts, some of which are much more serious than others. The acts range from exposing the sexual part of his body to unwanted touching and forced sexual relations. When prostitutes indicated to the researchers that they had been sexually abused as children, (a considerable number of them did indicate this), the tendency is to assume that they were victims of serious abuse, although this is not usually elaborated upon. However, we do not know whether the levels of serious sexual abuse of prostitutes when they were children is different from the level of the general population.

There is a further note of caution about this whole issue. As indicated in the description of the National Population Study of Pornography and Prostitution, the investigation of such complex issues through large-scale survey research is in its infancy, and this applies equally to the investigation of sexual abuse. The whole topic thus requires considerably more attention before we can feel really confident in speaking of the experiences of the public in general, and prostitutes in particular.

While the public perception of prostitutes may be that they are young and single, this view is most applicable to male prostitutes. As indicated previously, women prostitutes are not uniformly young nor are they uniformly single. It appears that some 20 to 25% of female street prostitutes are married or have been married, and that some of them have children to take care of. Information from the United Kingdom suggests that women find prostitution well-suited to working around the hours when the children are away from home,[17] but how prostitutes accommodate both work and family in Canadian cities, is something about which we know very little. Information from the Prairies suggests that prostitutes rely on the help of various family members for child care arrangements, a pattern which would seem to be the most likely and is indeed very common for all women in the labour force who have children.

Most prostitutes have a criminal record. Although this record may not be for prostitution offences, but be for such activities as shoplifting, prostitutes do run afoul of the law because of the business they are in. They are for instance, charged with such offences as soliciting in the streets or being a found-in in a bawdy house. The quasi-legality of the business may attract women and men who already have criminal records, and it certainly increases the probability of eventually acquiring one. In Ontario, 69% of the prostitutes interviewed had been arrested at least once, 25% of them for prostitution-related offences. Figures for the Maritimes were 62% with a criminal record, with 19% of the offences being related to prostitution. In Vancouver, 67% had a criminal record, the majority being charged with non-prostitution offences. There is, therefore, a similarity to the pattern of offences across the country. Again, we do not know the whole picture in terms of the relationship between being a prostitute and having a criminal record. Particularly, we do not know whether having such a record may bring a prostitute into contact with people who can facilitate her entry into the business, or whether the record is acquired subsequent to the decision to move into prostitution. Certainly a prior criminal record could be a factor in making it difficult to acquire employment in the regular way.

Prostitutes report using alcohol and drugs as part of their lifestyle, but there is no evidence whether they use alcohol to a greater or lesser extent than other people in their age group. Similarly, the use of soft, as opposed to hard, drugs is characteristic of prostitutes, but we do not know whether their patterns of use are different from other members of our society. The notion that prostitutes are on the street in order to earn the large amounts of money necessary to support a serious drug habit, does not find significant support from the research. There are some prostitutes who are in this position but they appear to be a very small part of the business and not at all typical. While some use alcohol and drugs in order to be able to cope with their work, the majority are not heavy users and do not use these substances while working because they do not want to lower their levels of awareness. In what is often a violent business, prostitutes need to keep all their wits about them. Many of the issues discussed above are reflected in the following case history:

Laura

Laura is a 19 year old ex-prostitute. She worked the streets for seven months, but is now attending the Dartmouth Work Activity Program through Probation services, where she is upgrading her clerical skills in order to get a job. She is separated, has no children and lives by herself in a rooming house.

Born in Halifax, her early childhood was spent in a rural setting. From the time she was eight years old she lived in Halifax and Darmouth, spending the summers in the country. During this period she was adopted, for reasons unknown to her, into a very large family, where the father was a building superintendent. The mother, who was an invalid, was described by Laura as "her best friend". She recalls arguments between her adoptive parents, at which time she would physically defend her mother against her father. She also remembers being sexually abused at the age of ten when her eighteen year old nephew threatened to beat her up if she did not have intercourse with him. This was her first sexual experience. Her adoptive mother was supportive by banishing the nephew, following the sexual assault. However, Laura felt that both parents were very restrictive and this is the reason she gave for constantly running away.

It was during one of these escapades that she met Pimp No. 1 on Gottingen Street (the pimp numbers refer to case studies elsewhere in the Report). "He knew I was scared and had no place to go. He asked if I was hungry and if I needed a place to sleep. So I said O.K." She lived at his girlfriend's house and was forced to earn her keep by prostituting. Pimp No. 1 initiated and then encouraged her dependency on drugs to keep her working for him. She was 14 when she turned her first trick.

Laura worked on the street with all the hazards inherent to that type of prostitution. She remembers being "hassled" by several pimps, being physically abused by a customer who wanted more than he had paid for and having treament for gonorrhea at a community clinic.

She would work for an average of five hours a night. During this time she would see six or seven customers who were predominately "white collar" workers and whose average age she estimated at fifty years. At one point she had ten or twelve regular customers. The act that was most requested of her was oral sex. On occasion she was called up to perform unusual acts, for example, spatting (defacating on the customer) and various S and M acts. She had also posed nude for photographs for a customer for $150.00. Laura did not like her work; she was continuously stoned on speed, mescaline or cocaine in order to forget what she was doing.

> She was expected to make at least $150.00 per night for Pimp No. 1. She turned it over nightly. In return for money she was given cigarettes and drugs.
>
> After some time on the street, Pimp No. 1 sold Laura to Pimp No. 4. Despite this, she "... fell in love with him". One night, when she held back some of the money from Pimp No. 4, she was locked in the living room, beaten and given no food for a long period of time.
>
> Laura commented about Pimp No. 4 who was in jail at the time of the interview; "I was scared to death of him and his violence. If he comes back to Halifax, he's coming for me".
>
> Laura has a criminal record for such offences as: shoplifting, disturbing the peace and impeding other persons.
>
> After a severe beating when Pimp No. 4 broke her nose and ribs and "drove a bullet in the wall above her head", she decided (with encouragement from another prostitute) to charge and testify against him. She remembers the Halifax morality officers as being very supportive. The support she received from the other prostitute and the police enabled her to leave prostitution.[18]

As indicated elsewhere in the report, most of our information relates to street prostitutes. Information on call-girl operations, for instance, is much more haphazard and incomplete. From the information which can be pieced together, however, it appears that call-girls are somewhat older than street prostitutes, better educated and not so reliant on prostitution because they often have other employment. Information about men who work in escort services or women in massage and body-rub parlours is simply not available.

4. Why Prostitution?

Overwhelmingly, prostitutes cite economic causes as the reason they are on the streets.

> "Money. I got involved to make money and because the man I was head-over-heels in love with wanted me to."
>
> "I became a whore for the money. I needed to eat. I had left my old man and I wasn't making enough money, so I became a whore."
>
> "I got to Canada and couldn't find a job. I needed money to live, so I became a prostitute."
>
> "I needed the money, but my family needed extra funds."
>
> "I was in a locked setting for youths. Some of the girls there were involved in prostitution. They told me about it, so I went out and did it. I was on the run and needed money to eat."
>
> "I got started because I wanted the money. A friend of mine always had money and clothes and I asked her how she did it. She told me - took me down to the agency she worked at and I got started in the business. Once I got started and making the money, it didn't seem like such a big deal. People do worse things for a living."

> "I got involved with prostitution because I wanted the finer things in life. I recognized I could get paid and paid well for providing well-off men with sexual services." (This respondent ended up as a call-girl after starting as a street-hooker.)
>
> *Comments from prostitutes in the Prairies*[19]

The precise nature of the economic motivation, however, obviously varies among prostitutes. Juveniles who are run-aways may end up prostituting themselves because they have no money, typically have no skills and wish to avoid authorities who might help, in case they are sent back home. In addition, of course, the fact that they are so young may mean that it is unlikely that they can find more usual forms of employment. Adult prostitutes may have similar experiences, having been unable to find alternative work, especially in times of high unemployment. Some groups of prostitutes face very particular problems. Trans-sexuals who are prostitutes report being on the street because of the reluctance of employers to hire them once they know of their change in sexual identity. Other prostitutes undoubtedly move into the business at the urging of friends or acquaintances, on the understanding that it is a lucrative business and free of many of the constraints on more run-of-the-mill occupations. Thus, it is seen as a good way to earn a living. Whatever the individual motivation, prostitution is a means of making a living; that is why people move into the profession and that is why they stay.

The regional studies indicate that prostitutes have relatively low levels of educational attainment in comparison to the general population and consequently, are less competitive in the search for jobs. The Maritime study found that 84% of street prostitutes had not completed high school, and the lowest figure across the country was in Québec where of those interviewed, 68%, had less than high school graduation. Some of the problems prostitutes face in finding other forms of employment are certainly substantiated, but we are unable to answer the question of why, in a group of people in virtually identical circumstances, some choose prostitution and others do not. Perhaps the deciding factor is that prostitutes already know someone in the business who encourages them and who can facilitate their entry.

Once in the business, it may be difficult to move out. Some prostitutes, particularly women, may be coerced into continuing in the profession, but it is probably the more indirect pressures which prove so difficult to overcome. In particular, prostitutes face the problem of explaining why they have no employment record, especially if they are single and cannot hide behind the possibility of having run a household and raised children. Prostitutes have no previous experience they can put before employers, and are unlikely to stress the skills they have acquired from being in the business. In a time of high unemployment, when employers have many people from whom to select for a job, prostitutes seeking to move into other occupations will likely appear to be poor prospects. Thus, the conditions that got them into the business in the first place may well keep them there after they wish to leave.

Despite the difficulties of giving up the business, however, it is apparent that most of them do. As indicated, most street prostitutes are young and have left the streets by their mid to late 20s. What happens to these women and men, and what is a normal career in prostitution, are questions to which we do not have answers. The small amount of evidence we have on call-girl operations suggests that street prostitutes do not move into these operations and prostitutes working in bars and night clubs are, again, typically young. It is reasonable to argue, therefore, that most prostitutes are out of the business by their mid 20s, but we do not know about their lives subsequent to their careers in prostitution. "What forms of employment do they take up;?" "Do they marry or maintain long term relationships in a manner similar to other people in society, and does prostitution have any long term effects on the well-being of ex-prostitutes?" These and similar questions require further research since we have no systematic information on these crucial issues.

5. The Business of Prostitution

Prostitution is a complex business and, as indicated earlier, one in which it is difficult to obtain comprehensive and accurate information. Based on the five regional studies, however, one has to conclude that the way in which street prostitution is currently carried out, results in a profession which is often dangerous, especially to the prostitute, but also to the customer at times. Certainly it is dehumanizing and fraught with potential and actual conflict between those in the business and people who wish to go about their own daily lives, and between the prostitutes and the police. Based on the evidence we have, it is impossible to believe that anyone can find the existing situation satisfactory.

Although it is very difficult to collect complete and accurate information, it would appear that most prostitutes are independent operators, that is, they are not organized or managed by any one other than themselves. While there are considerable variations both within and between cities in the organization of the business, we found no evidence to suggest a link between prostitution and organized crime. That is, there is no large-scale or interconnecting organization which in a highly organized way recruits, controls or moves women and men through prostitution circuits. Certainly, some street prostitutes are controlled by pimps and some call-girls are subject to the strict regulations of the madam for whom they work, but this sort of organization appears to be small-scale and each operation in a city is typically independent of the others. In some cities, notably Vancouver, the prostitutes themselves have attempted to organize their own business. The Alliance for the Safety of Prostitutes has attempted to improve the working conditions of prostitutes by increasing the understanding of the problems of the various parties affected by the business (prostitutes, general public, customers, police) and by publishing a "Bad Tricks" sheet. This publication describes customers who have behaved violently towards prostitutes and who should, therefore, be avoided. It would be accurate to say, however, that this attempt to organize prostitutes has not been very successful. Indeed, the problems the Alliance for the Safety of Prostitutes encountered probably parallel the problems other agencies face, in that prostitutes are independent people who prefer to organize their own work and their own lives.

Some prostitutes are, however, undoubtedly under the control of other people with respect to their work and typically, with respect to their lives outside the actual working situation. "For many of the prostitutes, the whole world is 'this man, and making money'. They don't want to think about the future. They're crazy."[20] The extent to which prostitutes are controlled by pimps is, of course, difficult to estimate. Prostitutes who are in what can be considered to be the stereotypical pimp-prostitute relationship, that is, a coercive and exploitative one, are unlikely to want to talk about their situation because of the violence that is likely to result when their pimps learn that they had been talking about the relationship. These women (there is no evidence that adult males are pimped) work for men who set quotas for the daily earnings, with $200.00 to $300.00 being the most common figure, or who take from 40 to 100% of the prostitutes' daily revenues. "At first I paid everything to a pimp. Then I got smart and started holding out at least one trick for myself. At the end, I held it all back for myself."[21] It appears that pimps do not run large "stables" of prostitutes but usually control two to six women within a well-defined territory. Pimps, along with customers, are the major source of violence against prostitutes. Women who would talk about their pimps indicated that physical violence, forced acts of sexual degradation and subtle forms of coercion, were used by the pimps to keep them on the streets. In some ways the relationship is most closely analogous to slavery. Prostitutes have no control over their lives, they are subject to constant exploitation and there are accounts of prostitutes being traded to another pimp to pay off debts or for money.

As it is illegal for pimps to operate, it is not surprising that prostitutes were reluctant to talk about this aspect of the business, especially when the threat of physical violence from the pimps is so likely to be realized. A further problem arises, however, because the current definition of pimp is so broad. While the stereotypical pimp-prostitute relationship, is that of a violent and abusive exploiter, prostitutes are aware that the husband or lover with whom they live in a genuinely voluntary and supportive relationship may be seen to be pimping his wife or girlfriend, especially if he is unemployed and living on the earnings his companion makes from prostitution.

> In any situation that you are involved with a person, on the personal level you are going to share things and they're going to share what they have; it's just a give and take type of thing, sometimes they might not have something and you help them or they help you when they have it and you don't, and they look after you when you are sick and keep you company.[22]

Knowing the ambiguous status of their men, prostitutes are unwilling to talk about their relationships with men who are not customers.

In each of the five studies, very few women admitted to being pimped. Cities such as Montréal, Québec, Trois-Rivières and St. John's appear to have very few pimps operating. In a city such as Vancouver, it is apparent that in some areas prostitutes work independently, whereas in other areas pimps appear to be in greater control. In some cities, Halifax and Winnipeg being notable examples, street prostitution is virtually controlled by pimps. These pimps are likely to fight each other for territory with the most powerful pimps controlling the best women (those young and very attractive) and the best areas in which to meet customers. As with many other illegal activities, one tends to find socially disadvantaged groups over-represented in the ranks of those known to be involved in pimping. In the Prairie provinces, for instance, men of native ancestry typically run native prostitutes, whereas in Halifax, it is evident that some notorious pimps come from local black families which have had a long history of problems and involvement in criminal activities. Indeed, it is unusual for pimps not to be involved in other illegal activities such as drug-dealing and gambling. The common understanding of pimps being engaged in a variety of illegal activities and living off the frailties of others in a violent and exploitative milieu can be substantiated, although how representative of pimps such men are is unknown. Only when prostitutes have suffered extreme abuse and their lives appear to be endangered are they likely to testify against their pimps. Police action against pimps is, therefore, very difficult and unlikely to result in a conviction unless a prostitute is willing to testify about the relationship. Consequently, police officers may simply resort to making life as difficult as possible for those men who they know are pimps, since they see these men as operating beyond the legal and moral boundaries of society, but are unable to lay charges.

The following account of a pimp illustrates the issue we have discussed:

Pimp No. 4

> Pimp No. 4 was 24 years old at the time of the trial. He is a black resident of Halifax. He was charged with "living on the avails of prostitution" (Sec.195(1)(j)). No. 4's criminal background included sixteen prior convictions on various offences including "trafficking of narcotics". He had already been incarcerated for 2 1/2 year period. No. 4 lived on the earnings of 17 year old Barbara from January to June 1982. During the six month period Barbara earned approximately $15,000. She worked six hours a night, 7 days a week, and earned between $150 and $200 a night, which she always turned over to No. 4. With this money, No. 4 paid for food, rent and her meagre clothing. The surplus was spent on his car, drugs and alcohol.
>
> Barbara testifed that she was often physically abused by No. 4. He would beat her if she did not earn enough money. She reported four particularly severe beatings in which No. 4 whipped her legs with a leather belt, hit her in the face, kicked her in the ribs and caused her nose to bleed. Barbara finally went to the police because she was afraid of further beatings and wanted to get away from No. 4.
>
> Throughout the trial, No. 4 maintained that he had not been living with Barbara and that he had his own income from "junking". No. 4's mother gave supporting testimony that he had not been living with Barbara. The judge, however, noted that he "thought the mother was lying". The Court's decision that No. 4 was guilty of "living on the avails of prostitution" was based on stronger evidence that he indeed was living with her and had no other source of income. No. 4 was sentenced to 2 1/2 years in Federal penitentiary.

> One social worker who was personally familiar with No. 4 provided background information for this case study. She stated that No. 4 came from a family of known "women haters". Several of his brothers and uncles had been pimps also. His father hated women and taught his son to call all women by derogatory names such as "whore", "cunt" and "bitch". No. 4's mother was beaten regularly by her husband and her sons. They lived in an apartment building in a poverty stricken area of Halifax where they often went without heat and food.
>
> No. 4's pimping tactics involved "hanging out at roller skating rinks, bowling alleys and shopping centres, preying on young children, most often with behavioural problems and unstable family backgrounds". The social worker further stated that she had treated female children who had been physically abused by No. 4. He had in the past brought children as young as eleven years old to a room where he was known to conduct his beatings. These children continued to live in fear of being brought there even after communication was broken with him. In some cases he prostituted the same children and even went as far as to bring the customers to his apartment to avoid the children being seen in public in the prostitution areas of Halifax.[23]

It is apparent that the question of pimps and their part in the business of prostitution, is by no means a simple or uniform occurrence across the country. While some women are controlled through entirely illegal and totally unacceptable relationships, others are able to work independently or work within a more acceptable (i.e. less violent and exploitative) business relationship. Still others would argue that they have no pimps, although a strictly legal interpretation of their relationships would conflict with the prostitute's statement.

The concern about pimps is understandable when one considers that the stereotypical view of them is taken to be the norm. It would appear, however, that the most highly organized segment of the prostitution business is the escort service operations. Public concern in this area is that the operations are controlled by organized crime, and that the prostitutes are treated simply as commodities to be moved around at the whim of the manager. We do not know the extent to which organized crime may be involved in such operations. We do know that some businesses are truly independent operations. Nevertheless, some of the more established operations have links to each other in different cities and there is evidence of circuits on which the prostitutes circulate. As the interviews with call-girls were with women who worked in the smaller operations, we have no information about the perceptions and opinions of call-girls working in the larger businesses. Whether they feel exploited or a lack of personal freedoms and independence are open questions. It should also be noted that women appear somewhat more likely to own and operate call-girl operations than other types of prostitution businesses. Evidence suggests that these women are independent operators and not fronts for organizations run by men, which are connected to various other illegal activities. The situation with regard to body-rub and massage parlours is not nearly so clear.

Street prostitutes are able to pursue their business because there are identifiable areas within cities and towns where those seeking to buy sexual services can go. Without defined territories for prostitution, street prostitutes would find it very difficult to contact potential customers and customers would find it equally difficult to find prostitutes.

Because of the need to be in identifiable areas and the fact that some locations are more advantageous than others, competition for space on the streets can be fierce.

> You start standing somewhere and if nobody kicks you off it's yours. If they kick you off it's theirs.
>
> You get there first. It's usually by seniority. The number of years a certain person has been around working at that corner and usually to work that territory you have to get in good with that person first of all then you've got to prove yourself; prove your worthiness. In other words if nobody likes me I'd be working down on Granville Street if I was lucky. Quite a few know me in the area so I'm allowed to work where I work. I'm sure if one of the trannys decided they didn't want me working around there I'm no match for a big tranny. I'm sure that I'd lose it but nobody's done that so far. In fact I have people I don't even know asking me to work with them. I say no because I'm o.k. where I'm working. It's not my territory, it's not anybody's territory, it's a combined group that works there.
>
> When I went down there I had to stand up to everybody; it's a test of guts. If you've got the moxy to stand up to them they will leave you alone. You may take a few shit kickings but if you can't fight back or don't fight back then they will walk all over you. It depends on how you establish yourself and then you establish your territory by being there saying that's my spot and you work away from me. Most of the girls that are down there now know me and they stay away from me. If I tell them to move, they move or I'll move them.
>
> *Vancouver*
> *prostitutes*[24]

Most areas of street prostitution (strolls) are located in downtown areas of cities and usually in the business or commercial areas. These are the areas large numbers of people pass through and where the bars and hotels are located. Prostitutes are thus operating in areas where they are most likely to meet the men who will buy their services. At the same time, this allows the customers anonymity because they are away from their home districts and because of the large numbers of people moving about in the downtown areas.

The most obvious exception to this pattern was Vancouver prior to June, 1984, where one of the three major areas for street prostitution was primarily a residential area in the West End section of the city. This part of the city had not always been a prostitution stroll but became so as prostitutes were pushed out of the nighclubs, bars and hotels of the downtown area. Given its proximity to the downtown region, this residential area was a convenient location to which the prostitutes could gravitate. In Toronto and Halifax, some street prostitution also takes place in areas where residents live. Prostitution strolls in these areas are not so clearly an invasion of established residential areas. Rather prostitutes and residents claim areas which are now being refurbished and becoming desirable residential locations.

The reasons street prostitutes pursue their business in these areas are because they are close to downtown areas, allow customers easy access by car and are not so uniformly residential that customers would be extremely visible and perhaps intimidated. It is not surprising that the greatest conflict over street prostitution occurs in these areas, because the activities associated with prostitution quite clearly conflict with the lifestyle and atmosphere that residents want for their neighbourhoods.

> I imagine some people complain about the activity. When it gets noisy, yes they complain which I don't blame them for doing, the police come down and say who's making the noise or whatever and they keep it down and if that continues they come and park their car on the corner so people eventually have to leave.[25]

Street prostitution increases traffic and impedes the flow of traffic as potential customers and simple onlookers cruise the streets. It increases the noise in neighbourhoods, particularly in the early morning hours, as car doors are slammed or altercations occur between the various parties to the business. Although prostitutes are rarely pressing and persistent in their solicitation of customers, most prostitutes have at some time approached someone they thought was a potential customer, but who, in fact, was not looking for sexual services. Similarly, women walking through these areas have sometimes been approached by men who thought they were prostitutes. Such instances of mistaken identity are understandably very aggravating and annoying for the person who is not, and does not want to be, involved in the prostitution business in any way whatsoever.

The fact that these mistaken approaches do occur points to the difficulty of prostitutes and customers identifying one another. Although working in defined areas, prostitutes are not particularly identifiable by their style of dress in most instances, but rather by their stance on the sidewalk and their willingness to make eye contact with male passers-by. Operating under these conditions, it is not surprising that people unconnected to the business are sometimes solicited. Perhaps what is surprising is that the incidences of mistaken identity are as few as they seem to be.

The problem of making contact only with interested parties is compounded by the fact that prostitutes are on the streets when there are also present a lot of people who are not looking for sexual services. While working hours vary from city to city, and according to the season, it is typical to find some prostitutes starting work at about 11:00 a.m. in time for what may be termed the "lunch-time customers". More prostitutes will be on the streets by 3:00 p.m. and most will be working from early evening through to midnight, with some continuing to the early hours of the morning. The number of hours worked in a week primarily depends on the financial needs of the prostitute, the demands of pimps and the level of competition among prostitutes for the customers. Prostitutes certainly work much less in the winter months and at all seasons generally prefer Wednesday to the end of the week as days to work. On a good day, prostitutes may have three or four customers but on bad days may have only one, and may even leave the street because no customers are willing to buy their services. Prostitutes also report exceptional days, however, when as many as ten customers are serviced.

It appears that the transaction is initiated as often by the customer as by the prostitute. A prostitute will try to settle all the details with regard to price and the services to be bought, before moving away with the customer. Although not generally the case, a number of prostitutes do work in pairs. In this way, they note who their friend has gone with, perhaps taking down the number of the car licence plate and alerting other prostitutes or the police if their friends are absent for an unusually long time, or if a customer is violent or does not pay the price negotiated.

The sexual acts most frequently requested are oral sex and sexual intercourse. The sexual transaction usually takes place in the customer's car, or in a hotel room selected by the prostitute. It is unusual for a sexual transaction to take more than 20 to 30 minutes from the time the customer and prostitute start to negotiate to the prostitute being back on the street. Quick, impersonal sexual relations are the norm. Only rarely are sado-masochistic acts requested or are invitations to produce pornographic material issued. In both these instances, prostitutes rarely accept the invitations, and if they do, may try to ensure that one of their friends is also included to give them greater safety.

Prostitutes are very aware of the dangers of sexually transmitted diseases (STDs) and the reputation prostitutes have for the spread of such diseases. (It should be noted that this reputation is unsubstantiated by epidemiological researchers, see page 395). Consequently, prostitutes virtually always require their customers to use condoms. Many prostitutes also practise other forms of birth control, so that the requirement for condoms is not to prevent conception. Rather, it is a precaution against contracting an STD and a barrier between the customer and the prostitute, so that the prostitute does not feel that she has allowed the customer to touch the most intimate parts of her body.

> All of my dates have to wear safes. Also, I do not let them kiss me or go down on me. If a safe breaks, I don't do anything with anyone until I know I'm all right. Some of the girls out there aren't that careful, though. ... I go for regular check-ups with my own doctor, but if I just want to check for something specific I will go the clinic. They are really polite there and don't make any comments about what I do. If a date doesn't want to use a safe I just explain to him what could happen - taking something home to his wife."[26]

Although street prostitution may appear to be quite unorganized and indeed, a chaotic business, the power of informal organization is reflected in the uniformity of prices charged for services, in the definition of territories and in the attempts to control what are seen to be the worst aspects of the business, for example, customer violence or the presence of very young prostitutes.

> A thirteen year old girl is working on Jervis Street right next to that corner and nobody is kicking them off. 13/14/15 year old girls that are getting into the D.A. (a drug) and they're undercutting. They're doing $20-$30 blow jobs but nobody kicks them off. (Q. Why do you think nobody kicks the other people off?) Because nobody's bothered and because they'll come back again. There used to be a lot more unity in the streets. I've been working down here for 8 years now off and on and people have really known me for about 3 1/2 years and about 6 months ago I was kicked off Jervis Street by someone I've never met before, by some big bitch and I turned around and said help me out

> here and everybody kicked her off. The new girls think that if they're bigger and stronger they can come down and kick everybody off which is not true. But nobody wants to help anyone else out because they're so worried about getting their fix or their goddamn rent paid they're not worried about the other people running around the street trying to get their rent paid and they're doing cheaper dates. Then all of a sudden everyone falls back down, going where's the money going to? How come we're not making any money? They're really fucked.[27]

That some level of organization does take place among the prostitutes is shown in the uniformity of prices charged for services within a city. Information is passed on to the new prostitutes, and they may not be allowed to work in a certain area or on a certain corner if the prostitutes already there consider the new person to be too disruptive to the existing patterns of business. Although many prostitutes report lowering their prices when they really needed some money, they are aware that such a practice is problematic and may result in confrontation with other prostitutes. If someone is known to be generally undercutting the accepted prices, prostitutes are likely to pressure that person to conform to the standards, or may push the person out of the area through continual harassment.

> Right now everybody is undercutting, I don't. Well I do sometimes, seriously. It's $80 for a lay and $100 for a half and half. I charge $70 - $90 and if I can $80 - $100. $70 - $90 is really not undercutting, but it's the lowest you're supposed to go. I don't compete that much and have quite a few regulars and it's just whoever stops, stops. It takes longer to catch a trick these days.[28]

Despite some minimal level of organization, prostitutes' incomes are much lower than sensationalist accounts may have led people to believe. The income structure of prostitution mimics the income structure in other forms of employment: women typically earn less than men and employees earn less than managers. In the prostitution hierarchy, madams of the larger escort services make the most money followed by pimps, escort service prostitutes, male street prostitutes, female street prostitutes and those working bars and taverns, and juveniles. This hierarchy is quite rigid so that street prostitutes and those working in bars and taverns rarely move into the higher paying escort services. As suggested earlier, street prostitutes may well be the most socially disadvantaged as well as the most economically disadvantaged of prostitutes.

Income levels are difficult to calculate because the numbers of days a week worked and the number of weeks a year, are not documented. Researchers have to rely on the recall of the prostitutes themselves. Similarly, there is a considerable fluctuation in the number of customers and it is difficult to recall the level of activity from several months previously. Researchers estimate income on the basis of several assumptions, and in doing so make educated guesses about the number of customers a prostitute may have during an average day or week. The best estimates put the net income of a female street prostitute at $12,000 to $15,000 per year. Although prostitutes can legitimately claim deductions for business related expenses such as tips to intermediaries, clothing, condoms, legal fees and meals, if they obtain the necessary receipts, few prostitutes do this. Nevertheless, these can be seen as expenses associated with the business and have been taken into consideration when calculating a net income. Prostitutes with pimps see very little of their income since they are likely to turn over anywhere from 40 to 100% of their earnings.

> The more you make, the more you throw away. The first few years are your best, and those you lose - can't tell the girls that their money is going to drop when they're making $300 - $500 a night. It only lasts so long ...[29]

Perhaps a further indication that prostitution is not as rewarding as believed is that prostitutes appear to accumulate very little in the way of assets. Thus, the belief that a prostitute can easily make a fortune on the streets would appear to be very exaggerated and seems to come from newspaper reports that provide little in the way of evidence to support their claims. While some prostitutes may have relatively high incomes (the Committee heard reports of prostitutes whose gross incomes were over $40,000 a year), it appears that the majority do not earn anything close to such an amount, but that they live on relatively modest levels of income.

Male prostitutes can earn higher incomes because the prices they charge are typically somewhat higher than those of the women, and they keep the money they earn since they have no pimps. Call-girls would appear to have even higher levels of income, despite turning over a percentage of their earning to the organization. It appears not uncommon for call-girls to pay 40% of their fee from the client to the management. The fees they charge, however, are several times higher than those of street prostitutes and so despite not keeping all the money they earn, call-girls are likely to have substantially higher incomes than women working on the street.

Prostitutes appear to start in business in the city closest to them, or if it is a large city, in the city where they were brought up. However, some movement does occur between cities. In the west, prostitutes are likely to move on a circuit from Winnipeg to Vancouver, while a corresponding eastern circuit stretches from St. John's to Toronto. Although these circuits are the common ones, it is not unusual to find that prostitutes move from one end of the country to the other. Prostitutes also move backwards and forwards over the U.S.A. and Canada border, particularly in the Maritimes, Ontario and British Columbia. The major part of this movement results in women from the U.S.A. coming to Canada to work because it is easier to be a prostitute in Canada, or because they follow the convention trade into the larger Canadian cities. The movement of prostitutes within Canada usually results from there being a bad market in one area, from an attempt to escape a pimp, or from police harassing or seeking a particular prostitute.

Concern that there may be a revival of an international white slave trade appears unfounded. Prostitutes within Canada generally make their own decisions to move, and the researchers found virtually no evidence that women were moving across international boundaries (except the U.S.-Canada border) with the express purpose of continuing or starting in prostitution. Only in the Prairies was there any suggestion that women were being brought into Canada (in this case from Asia) for a short time period for the purposes of prostitution, and this report is somewhat tentative.

6. Customers

The one category of individual about whom it is virtually impossible to obtain first hand information, and yet without whom none of this often complex and unsavoury business would function, is the customer. Prostitutes indicate that a majority of their customers are married men between the ages of 30 and 50. These men come from all social and economic backgrounds, but there is some indication that street prostitutes service blue collar workers, and some white collar workers while escort services are frequented by men with somewhat higher incomes. We know virtually nothing of the motivations of these men who buy the services of prostitutes, and we are really able to only speculate about their behaviour. Prostitutes indicate that men are sometimes looking for sexual acts in which their wives will not participate. Further, prostitutes with regular customers indicate that these men generally describe unsatisfactory sexual relations within their marriages. We do not know, however, whether these accounts are representative of the reasons why men use prostitutes.

> Men buy sex for all kinds of reasons. Their wives won't do what they want them to. I don't know. If I had a lot of money I might even pay for it. It avoids a lot of hassle. I've been hurt in a lot of relationships so I know what it is. It's just like purchasing a movie and watching it. You enjoy it for the length of time and then you return and that's all there is to it. There's nothing else to it. Just the discreetness of it and that's all they want out of it is the immediate satisfaction and nothing more or it's either that generally or they're really lonely. They're really lonely and they don't know how to make friends or they don't know how to go out and meet anybody.
>
> I'd say 50% of them is out of curiosity because the women down there are supposed to be thought of as sexy and all that sort of stuff and a lot of them really aren't. 25% are getting something that they don't get at home which is, for example, the S & M trips. Husbands who want blow jobs, but they don't get them at home, buy them. The other 25% are just lonely people that are very unsuccessful with women.
>
> They're just men that need to get something and they can't get it for free and everybody needs it once in awhile. They're not bad people, some of them are good people, some of them are bad.
>
> Men who go to prostitutes go to prostitutes (and I've been hooking for 19 years) because it's a power trip. They pay the money, they get to call the shots. They own you for that 1/2 hour or that 20 minutes or that hour. They are buying you. They have no attachments, you're not a person, you're a thing to be used.
>
> I have no idea why gay men buy sex. I think it's pretty stupid. I don't know why. I think that they can just go to any of these gays bars around here, and find some cute little guy or some older guy or whatever they want for nothing. I think they enjoy paying for it.
>
> *Quotes from Vancouver*
> *prostitutes*[30]

Single men tend to stress the ease of buying sexual needs without building any long term commitments. Depersonalized sex is indeed what they want and what they buy. Male prostitutes suggest that their customers are a mix of men who are relatively open in the fact that they are homosexual and men, often married, who would not want it known that they had homosexual preferences. At this stage, the conclusion would be that those who use the services of female prostitutes are a cross-section of ordinary Canadian men, with the exception that they buy sexual services.

Based on the results of the National Population Study, four percent of men have bought the services of a prostitute at least once. Most of those respondents used such services five times or fewer but there appears to be a smaller category for whom the buying of sex is a regular activity. This suggests that there may be two broad categories of customers: those who use prostitutes' services just a few times and perhaps out of a curiosity to try different sexual acts, and those for whom prostitutes constitute a major means of satisfying their sexual needs. The possibility of such different categories of customers, an understanding of their motivations and their personal and social characteristics, are all areas in need of substantial research.

Customers are the primary source of sexual violence against prostitutes and may be the cause of most of the violence the prostitutes experience, depending on the prevalence of pimps. The majority of prostitutes have been sexually assaulted at least once by a customer, and have had money stolen from them or withheld despite the provision of services. Although it appears to be less common than customers assaulting prostitutes, customers are also subject to violence and theft by prostitutes or pimps.

7. Control Practices

In considering the problems associated with the current legal system and its control of prostitution-related activities, prostitutes themselves are only too well aware of the problems they encounter. The special laws in the *Criminal Code* that deal with activities relating to prostitution, mean that prostitution is not regarded as a normal business to be regulated by the usual provincial and municipal schemes. Rather, prostitution is seen as something extraordinary which requires unique legislation. Laws which are designed to control activities such as extortion, fraud, blackmail, or intimidation in normal businesses, are seen to be inadequate with respect to prostitution. Instead we have a series of special laws. This legislation reflects the thinking of earlier generations which saw prostitution and related activites as immoral, the people engaged in these activities as truly depraved or of sub-normal intelligence, and always, the danger of innocent women being seduced into the business. Special legislation to counter such unacceptable behaviour was seen as necessary, remembering that then, as now, there was a certain level of hypocrisy involved in the whole business. Although prostitution was decried by many people, many others used the services of prostitutes and argued that prostitution was necessary and would always be with us. Attitudes towards prostitutes themselves have always been ambiguous and complex, and remain so today.

Relations between police and prostitutes can be characterized as uneven at best. While police officers must and do protect prostitutes who have been assaulted, it is clear that an ambivalent attitude prevails with respect to dealing with them. On one hand, prostitutes are entitled to be treated like any other citizen, but on the other, the police will argue that prostitutes are in a violent and quasi-legal profession and should not be surprised when they are mistreated. Their close connection to other illegal activities in some instances, makes them subject to pressure from the police when information about offences is being sought.

The unevenness of the prostitute/police relationship is reflected in the following statements:

> I have a pretty good relationship with the police. I don't do anything illegal so they have nothing really to bother me about. I keep to myself.
>
> Some relationships I have with police are very good, some of them are very fatherly, some are nice, I find the older policemen that have seen years of service, tend to understand life, lifestyles, life trends, whatever you want to call it, and they just - well age teaches you everything and they don't react as violently to things as younger officers. Some young policemen, fresh on the force, can be complete assholes in the sense that I'm wearing a badge so I can say or do anything I want to do.
>
> Some of them can be alright, some of them can be pricks. Depends on what cop it is. There's good and bad in everything.
>
> A couple of girls jacked me up one night as I was standing on the corner, and oh thank God there was a cop coming around the corner. I was scared shitless. The funny thing is that I had been extra mouthy with this one cop just 15 minutes before - he must have thought "Oh, that mouthy little cunt." I guess he just saw that there was something wrong and he pulled right over and just sat there and watched. And then he says "Hey, you, come here." I went over, shaking, and he said "What's the matter?" It was really great - he got me out of there. The more you're nice to them, the more you find they are nice to you. If you're a real little bitch, they kind of let you have it.

And in the case of another woman:

> This one cop ran two blocks to get this pimp off my back. He intervened and got this guy out of there. And yet when he first came downtown he was a real jerk but he learned more or less the law of the street, not the law of the street but the ambience of the street. He had the intelligence to deal with it properly and not go around being an asshole.
>
> *Quotes from prostitutes in Vancouver,*[31]

A police officer in the Prairies made the following comments:

> If there are any criminal acts against them they have the right to complain ... just because she's a prostitute, doesn't mean people can kick her ass around. I don't agree with what they do, but it doesn't give me the right to tell them they don't deserve help. I mean, a guy goes around beating up girls he thinks

> are prostitutes, some time he might beat up someone who isn't. I've heard guys (other than police) who don't want to help because they feel they're scum and they deserve what they get.[32]

Prostitution laws are probably no different from other morals laws with respect to their enforcement. Nor is control by the police of undesirable, although not necessarily illegal prostitution activities different from the control of other activities deemed to be a problem. Control practices are both formal and informal. Arrests are made and charges are laid because participants in the business of prostitution are thought to have contravened specific sections of the *Criminal Code*. In addition, the police seek to control prostitution activities through means other than laying charges: by the selective patrolling of the streets, accumulating information on prostitutes, and generally making it more difficult for customers and prostitutes to meet. As in other areas of the law, the relatively powerless are controlled, accused and convicted and the relatively powerful are ignored, excused and acquitted.

Female street prostitutes are more likely to be arrested and convicted of prostitution-related crimes than any other category of person involved in the business. Pimps and customers are the least likely to be charged and convicted. Thus the enforcement pattern is uneven with respect to gender and occupation. It should be noted, however, that the low level of charges and convictions against pimps does not appear to be the result of biased law enforcement on the part of police forces, as much as a reflection of the difficulty of accumulating sufficient evidence on pimps' activities.

The reasons that customers are so rarely prosecuted, however, may not be so clear cut and is certainly a contentious issue with many people and organizations. Because it takes both a prostitute and her customer to participate in the activity, there seems to be no reason why the buyer should receive preferential treatment at the expense of the seller. There appear, however, to be several reasons why the buyers of sexual services have been treated differently from the sellers. In some instances, the law has dictated this differential treatment. Street solicitation laws, for instance, typically allow charging of prostitutes, but not customers. In other instances, the different treatment of prostitutes and customers is caused by the decision to apply the law in a particular way. Customers could be charged for being an inmate of a bawdy house, for example, but are sometimes released in exchange for assistance in prosecuting the owners of the establishment. It is also undoubtedly the case that some police officers felt sympathetic towards the customers and were less likely to press charges, the belief being that the customer was sufficiently scared about losing his good name and was unlikely to buy a prostitute's services again. Such a line of action does, however, assume that the police understand the motivation of customers and this seems unlikely, given the little we know about them. Perhaps more importantly, it underplays the role of men as customers in the whole business of prostitution and leaves the belief that if we control the behaviour of prostitutes we will have solved the problems of prostitution.

Attitudes towards customers and control of their actions are revealed by statements from the police in the Prairies:

> We search them (pimps) all the time since a number of them are in the drug trade. We don't as often search the girls. Sometimes we take them in and search them. It takes them (the women) off the street and interrupts their business flow. If we see a guy talking to a prostitute, we'll stop and converse with them. They usually get nervous and drive away when we pull up. If we see them in a parking lot with a guy, we may approach and talk to them. Run the client's name for warrants. Maybe give them a parking violation. A lot of them know we can't do much, but the average person gets embarrassed and leaves. If they get offensive, we try to embarrass them and dissuade them from returning. We make it clear to some people that we don't want them back. We tell them they'll get in trouble from prostitutes or us. We say 'who knows what will happen in a dark alley', and let them draw their inferences from that. If they do come back, nothing happens. Sometimes it works. Sometimes it doesn't.
>
> We spot-check clients. We ask for two things, a driver's licence and hospitalization card. That way we can tell if he has a wife and kids. If he does, we tell him if we see him down there one more time, his wife will be getting an anonymous phone call telling her where her husband is. We do this if we see the guy enough. These guys backtrack like you wouldn't believe, even don't take the girl back to where they pick her up, to miss us. The department (police) would rake us over the coals if they ever found out we did this.
>
> Clients are used for statements. They're usually scared of publicity so they'll give a statement if they're gotten to right away. We don't usually charge clients.
>
> The clients aren't charged. Instead we use them to get statements and then subpoena them to court to do our bawdy house charges. We have to have the customers. They show up.
>
> We never charge customers because we use them.[33]

Efforts to control prostitution are directed almost exclusively towards the prostitute, rarely at the customer and occasionally at those who run or control certain aspects of the business. It is apparent that prostitutes do indeed change their behaviour in response to both legal changes and informal control practices. Although they do not necessarily have a complete understanding of the legal intricacies surrounding the issue of street solicitation, most prostitutes appear to be aware that they have to be fairly circumspect in their approach to customers. Similarly, they are aware that the activities of pimps are illegal and that difficulties surround the use of certain locations for the completion of the sexual transaction. Control of some of the undesirable activities associated with prostitution through the law is certainly evident to a degree.

> The brass deal with the laws. As street cops, we deal with people as people in our area. We deal with our safety, their safety, and other people's safety.[34]

On a day to day basis, however, it is the more informal control methods which bring the police and the participants in prostitution into contact. The decision to patrol the prostitution strolls more actively usually results in a decrease in activities, as customers, in particular, become wary of being identified. In this way, the police in many cities are able to keep prostitution within confined areas and at levels that are reasonably tolerable to the community. By discouraging customers, it is possible to retain some control over the number of prostitutes on the street and their location.

> We can screw up their whole day, just by standing there. It puts the clinch on and takes money away from them. Clients leave. I think they think (the clients) we can do a lot more about it. They leave because they're embarrassed. Who'd want to say they took a hooker and had to pay for it. The girls show their displeasure. They come up and tell us or wave us away. Our 'standing around' is our way of saying we want to find something out, or we are getting pressure from the brass (police administration), or the community, all that bureaucratic bullshit. That's why the beatmen are on the street. It's good for public relations to have beatmen walking around because it makes them (the women) go indoors and keeps them out of the public eye.[35]

The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens. The police and the public act towards prostitutes in ways that they would not with other women or men. The police in some cities take photographs of the prostitutes, with or without their consent, to keep on file. These files are justified on the grounds of wanting to be able to identify prostitutes if they are missing and a serious crime is suspected, but more importantly, they allow the police better control over the prostitutes' behaviour through increasing documentation on who they are and what they have done. The police files are an illustration of the ambiguity of their response towards prostitution: on the one hand they may help prostitutes, but on the other, they control them in ways they would not use for other citizens.

Prostitutes in Vancouver gave accounts of their experiences with picture taking:

> They've always said I would like to take your picture so sure I go along with it and you never know, something might happen to me and I might be in such shape that I'm unidentifiable and that might just help. I find that the people that use their camera more forcibly are the press more than the police and there's always the little boys running around clicking off their camera. The press are the people that are exploiting the picture thing, not the police. They usually come up and ask you, usually quite polite about it because the ones that are doing it I find are the police that have been around for a while.
>
> Yes they took my picture very sneakily. They drive by when you're not looking and I thought that was illegal. I told the girls don't, if they come up to you, say no, I'm not doing it, and if they insist, say no I don't have to, it's against the law, which it is. It's a harassment thing.
>
> Not forcibly but they said we have to have your picture taken and they took my picture. It's not like they pinned me down and took my picture but they said we'll get it one way or another. The ones that took my picture were actually quite nice about it.[36]

From the Prairies the police explained their actions and reasons:

> We talk to them, try to find out who they are and where they are from. Tell them who we are and explain what we can do for them if they decide to get off the street. Then take their photo and fill out an identification sheet. Tell them that the I.D. process will help us to notify next of kin if anything happens to them. They are generally pretty co-operative.
>
> We find out who she is, whether she has a record. Then fill out an information sheet for Vice. We circulate the news to other guys. If Vice asks, we get a picture. Usually walk up to the girl with a polaroid and say "Smile". If they won't let us take their picture, we play word games with them. Tell them we think they must have done something wrong or look much like a person who committed an offence and we need to take the picture to pass around and see if it really is the person. We run them on CPIC also to see if they're violent.
>
> We stop and do a check. Then we put them to the attention of vice. They take her picture if they haven't already. Vice is usually right on top of that. The women know that if they want to work out there, they'll let us take their picture. They'll be convinced, "advised", that they should follow the procedure. We tell them it's in case we have any complaints about them or in case we find them 'upside down' (dead). Most go along with it. Sometimes if they don't we park our car in front of her for a week until she does.[37]

The public's attitude towards prostitutes is similarly ambiguous. Some customers appear to feel little compunction about assaulting or stealing from prostitutes. Other people feel entitled to abuse prostitutes verbally, to throw things at them and to indicate that they have no right to be on the streets. At the same time, the public appears reluctant to tackle the issue in a systematic and logical manner. Rather, there is an insistence that prostitution be moved out of an area but little concern for what will happen to other areas or for the prostitutes themselves.

The current special status of prostitution in the *Criminal Code* does not appear to have given society the protection it seeks from the harmful consequences of prostitution, nor to have given prostitutes the right to dignity and equal treatment in society. Information from the public hearings and the Department of Justice's research program, leads to the conclusion that the current law and its practice is unsatisfactory from virtually everyone's point of view: prostitutes, public and police. Opinions clearly differ, however, about proposals for change and these are reported more fully in subsection 9 of this Chapter. It is worth noting here, however, that those most affected by changes, prostitutes and police, do not espouse only one solution. Although police officers have a vested interest in maintaining control of street activities and being able to easily discover linkages between prostitution and illegal activities, not all police forces and not all officers within any particular force believe that tougher laws are the appropriate way to deal with prostitution. Police opinion is not unidimensional nor unambiguous. Interviews with police officers in the regional studies indicate that many would prefer some form of decriminalization of prostitution activities. What they ask for is that there be clear legislation and clear government policy based on their belief that prostitution will always be with us.

Prostitutes echo these sentiments. They see the current laws as pure hypocrisy. Prostitution is not illegal, but it is virtually impossible to practise it anywhere but in the streets. Working on the streets then leads to conflict with the public and the police. Prostitutes argue that they should be allowed to work out of their apartments or other establishments, which within the present context of the law, calls for revisions to the sections on bawdy houses. As with others who have expressed their views, prostitutes are by no means unanimous about the necessary legal changes. Although virtually all would wish to carry out their work free from legal restrictions, some have argued that it is safer to work on the streets where one is visible, than behind closed doors.

The current system of prostitution clearly assigns to the prostitute a disproportionate part of the responsibility for the activities. While there are others who suffer, it is the prostitute who is most severely harmed. This is the case whether one looks at the more abstract question of prostitutes' status in society and their standing in the law, or at their daily experiences where it is apparent that they suffer enormous indignities and violence.

> Why do we turn so much away from the straight life? Because we're not even considered part of society. For example, to rent a place, you need to put down your occupation. You can't get a bank loan, buy a car... You need to come up with stories. So you live in a world that is strictly cash ... When you leave the business, you have to start at the bottom again. People ask what you've been doing the last five years. Society is what shapes how girls get out of the business. The minute you try to do anything like open a business with money, the government is down your back. You have to fight the whole world. You try to make it back into the system, get fired, and then people ask, 'Why didn't you make it'.[38]
>
> For years I had a very low self esteem. Society's attitudes makes one feel different about themself. The reinforcement that you're a whore, that you're nothing, that you're a low life does have an impact on how you feel about yourself. If you're constantly being told that given the same message for years and years and years by society, by the social agencies, by the police force, by your family, you can't help but have a low self esteem and it's only in the last couple of years that I've started feeling good about myself. For years I didn't.
>
> Now I feel good about myself. For awhile I was really confused. I didn't know how I felt about myself because people, they treat you a lot differently when they know you're a hooker. They really talk down to you or treat you as a lesser being. Now I say fuck you, you think you're so high and mighty, I probably fucked your old man and he paid me good. Now it's like, you're no better than I am. I'm probably better than you are because I can face up to life and not ignore things that you ignore but before it was like I didn't feel as good about myself as I do now. I've come to accept it.[39]

Prostitutes agree that life on the street is a "hell hole". Virtually all women prostitutes have been sexually assaulted, and some of them as often as three or four times a year; pimps are violent towards their prostitutes and prostitutes are violent towards each other. The competition to be on the street and to earn some money is fierce. And, perhaps as a consequence of our attitudes towards prostitutes, very little attention is paid to their specific needs in relation to social services.

8. Social and Health Services

Prostitutes appear to use very few social services. Some prostitutes do use the provincial welfare systems and survive financially through a mixture of government financial aid and prostitution. On the whole, however, it appears that prostitutes are on the streets as an alternative to living on welfare and only move to such programs when business is extremely poor or they are unable to work for some reason or other. Apart from a sporadic use of welfare systems, prostitutes also use legal aid and medical clinics, both services being closely related to some consequence of being in the business.

While the use of legal aid clinics is perhaps easy to understand, the relationship between sexually transmitted diseases (STDs) and prostitution is not so readily apparent. Certainly, a majority of prostitutes do contract an STD at least once during their time on the streets. Most however, are very well aware of the problems associated with STD's, visit medical clinics regularly and take precautionary measures, usually requiring customers to use condoms. Adult prostitutes also stop working when they are infected because word about their state spreads quickly. An infected prostitute not only finds that business stops, but that it has a harmful effect on others' business in the same area. Pressure to stop working is, therefore, likely to be intense.

Although prostitutes do contract STDs, the public's strongly held belief (held by 69% of the survey respondents) that prostitutes are a major cause of the spread of such diseases, is not substantiated. Epidemiological studies indicate that prostitutes are not a prime factor in the spreading of STDs. This occurs as a consequence of sexual mores changing throughout society and cannot be seen as the result of the behaviour of one relatively small group of people. As indicated, prostitutes, of all people in society, have a real interest in seeing that they are not infected.

Recent public concern about STDs has probably been influenced by accounts in the media of homosexual men who have contracted AIDS (acquired immune deficiency syndrome). At this time, this is a highly-charged issue and subject to very intensive research efforts. Our understanding of its causes and the manner in which it is passed from one person to another is incomplete. Nevertheless, it appears that high levels of sexual activity with a variety of partners is a greater factor in the spread of the disease than is prostitution. In addition, the view that the disease was confined only to homosexual men is being challenged. As more information becomes available, it may be necessary to reconsider our conclusions, but at this time, any notion that prostitutes play a decisive role in the spread of the disease, is unsubstantiated.

9. Public Opinions and Perceptions

The public opinions and perceptions reported in this section are based on the National Population Study on Pornography and Prostitution. While some people may question the extent to which one can gain an understanding of the public's views on such a complex issue as prostitution in a relatively short interview, we consider the results of the survey important to report. In the first instance, they may suggest lines of research which had not previously been considered. Secondly, they suggest areas where there is a need for public debate and efforts at public education. Thirdly, we believe that they do indeed give a good indication of the public's knowledge and some of their views on the subject of prostitution.

It is evident from the survey results that prostitution is not a major problem or concern for the majority of Canadians. While for some, the issues have become overwhelmingly significant, most Canadians do not encounter any of the activities associated with prostitution, and for them it is not an important issue. Fifty-five percent of the respondents indicated that they did not know of any places in their towns or cities where prostitution was occurring. In addition, approximately three-quarters of those surveyed thought that street soliciting was not occurring in their residential neighbourhoods or in the areas where they shopped. Given these results, it is apparent that most Canadians do not have a first hand knowledge of the problems associated with prostitution and street solicitation in particular. This view is confirmed by the fact that only four percent of the respondents, all men, indicated that they had ever bought the sexual services of a prostitute. Fifteen percent of respondents did, however, know someone who had accepted money in exchange for sex and twenty-one percent knew someone who had paid for sexual services. It is perhaps not surprising, given the nature of the business, to find that respondents in larger communities, men, younger people and those who are single, are most aware that prostitution is being carried on or know someone who has bought or sold sexual services.

On the basis of all these figures, one can conclude that most Canadians' views on prostitution have not been moulded by their own experiences or observations. Instead the information about prostitution which people have is likely to have come from the mass media, and to supplement any orientation to the issue that might have been learned through religious teachings or the educational system. Much, and in some cities most, of the newspaper coverage given to prostitution during the past five years, has dealt with the problems of enforcing the current street soliciting legislation and called for stricter laws. Coverage of prostitution-related issues has not been particularly comprehensive and it is not surprising, therefore, that the public, depending on the mass media for its information, is not particularly well informed or knowledgeable about the current situation.

Prostitution is defined by 90% of the respondents as the exchange of sex for money. This high level of agreement over the definition suggests that there is little ambiguity in the public's mind about the activity. Indeed, a somewhat more complex notion of prostitution that would imply providing sexual services for material gains other than money, is supported by somewhat less than three-fifths (57%) of the respondents. Women are considerably more likely than men to believe that sex in exchange for non-monetary items is also prostitution.

Many, but by no means all Canadians, find prostitution morally unacceptable. The exchange of sex for money is considered morally wrong by 62%, but this figure drops to 53% when sex is exchanged for other benefits. Men and residents of larger communities are the most accepting of prostitution.

These figures indicate that there is a considerable diversity of opinion in Canada and that proposed responses to some of the issues will not be universally acceptable.

There is a very high agreement, however, on the question of street solicitation. The various forms of prostitution differ with respect to the extent to which people will tolerate them, with prostitution on private premises being most acceptable (45% in favour of allowing this form of the business), followed by escort and call-girl services (43%), brothels (38%), all forms of prostitution but in designated areas (28%), and street solicitation (11%). Clearly, prostitution which takes place on the street is decried by overwhelming numbers of Canadians. Women and older citizens, in particular, are offended by street solicitation. Perhaps contrary to what one might expect, those who have had most exposure to prostitution, find it more acceptable than those who have had no personal familiarity with how prostitution is actually carried out.

Although prostitution is unacceptable to many respondents, only 51% thought the business degrading to prostitutes, and 46% believed it degrading to customers. Thus, although prostitution is morally unacceptable to many Canadians, they do not necessarily consider the participants in the transaction to have lost status.

Beliefs about the actual operations of prostitution lead 60% of the respondents to maintain that organized crime is a major factor in the business, and that most prostitutes have pimps. On the basis of our other information, we would suggest that the public's perceptions are incorrect. Similarly, the belief held by 69% of those surveyed, that prostitutes are a major cause of the spread of sexually transmitted diseases, is not confirmed by the available research.

Differences of opinion about the reasons why people become prostitutes are also evident. Slightly over half of the respondents (52%) suggest that economic reasons account for adults being prostitutes, whereas prostitutes themselves cite such reasons with much greater frequency. Based on other data, it also appears that the public has an inflated view of the income of many prostitutes.

With regard to the responses given to questions on controlling prostitution and related activities, again there is a high degree of agreement on some issues and a diversity of opinion on others. Sixty-four percent of the respondents, and especially those in British Columbia, thought that the legal system does not deal adequately with prostitution. For some, (32%), the solution would be to legalize or decriminalize prostitution, whereas others (40%) would suggest more stringent legislation. Whereas, Alberta and British Columbia residents were most likely to support the former alternative, residents of Atlantic Canada and francophones opted for the latter solution. As indicated, opinions again varied over how and where prostitution should be carried out, with 72% of respondents wanting tougher laws to allow the police more control of street soliciting, since the street is the least acceptable place for the business.

The survey results present an intriguing view of the public's thinking about some of the issues surrounding prostitution. What it may demonstrate most clearly is the need to better understand the public's responses to the phenomenon of prostitution, and the diversity of opinion on all issues. This diversity does not, however, reflect a view that the existing system should remain unchanged. Indeed, perhaps the most compelling reason to develop a more satisfactory system for all those affected by prostitution, is the fact that 92% of the respondents, and by inference, 92% of Canadians, think that prostitution will always be part of our society.

Footnotes

[1] See *Prostitution in Canada*, Canadian Advisory Council on the Status of Women (1984), for a bibliography of recent research on prostitution which highlights Canadian studies.

[2] *Ibid.*, c. 1.

[3] N. Crook, *A Report on Prostitution in the Atlantic Provinces* WPPP#12; J. Fleischman, *A Report on Prostitution in Ontario* WPPP#10; R. Gemme, A. Murphy, M. Bourque, M.A. Nemeh, and N. Payment, *A Report on Prostitution in Québec* WPPP#11; M. Lautt, *A Report on Prostitution in the Prairies* WPPP#9; J. Lowman, *Vancouver Field Study on Prostitution* WPPP#8.

[4] Peat Marwick and Partners, *National Population Study on Pornography and Prostitution* WPPP#6.

[5] *Ibid.*, at 1.

[6] C.H.S. Jayewardene, T. Juliani and C.K. Talbot, *Pornography and Prostitution in Selected Countries* WPPP#4; J. Kiedrowski and J.M. van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden*, WPPP#1; D. Sansfaçon, *Pornography and Prostitution in the United States*, WPPP#2, and *United Nations Conventions, Agreements and Resolutions on Prostitution and Pornography* WPPP#3.

[7] M. El Komos, *Canadian Newspaper Coverage of Prostitution and Pornography* WPPP#5; M. Haug and M. Cini, *The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases* WPPP#7.

[8] Report of the Committee on Sexual Offences Against Children and Youth, Ottawa: Supply and Services, 1984.

[9] N. Burley and R. Symanski, "Women Without: An Evolutionary and Cross-Cultural Perspective on Prostitution," in Richard Symanski, ed., *The Immoral Landscape: Female Prostitution in Western Societies* (Toronto: Butterworths, 1981) at 239-73.

[10] See J. Fingard, "The Social Evil in Halifax in the Mid-19th Century", Department of History, Dalhousie University, Halifax, N.S., unpublished paper; B. Senioc, *British Regulars in Montreal* (Montreal: McGill Queen's Press, 1981); J. H. Gray, *Red Lights on the Prairies* (Toronto: MacMillan, 1971).

[11] Crook, *A Report on Prostitution in the Atlantic Provinces* WPPP#12

[12] Lowman, *Vancouver Field Study of Prostitution* WPPP#8

[13] James Douglas Gordon, *Halifax - Its Sins and Sorrows* (Halifax: Conference Job Printing, 1862).

[14] Crook, *op. cit.* at 48.

[15] James and Meyending, "Early Sexual Experience and Prostitution", (1977) 134 *Am. J. of Psych.* 1381.

[16] Badgley Report, vol I, 175-193.

[17] McLeod, *Women Working: Prostitution Now* (London: Croom Helm Ltd., 1982).

[18] Crook, *op. cit.* at 46.

[19] Lautt, *Prostitution in the Prairies* WPPP#9 at 45-47.

[20] *Ibid.*, at 94.

[21] *Ibid.*, at 95.

[22] Lowman, *op cit.* at 195.

[23] Crook, *op. cit.* at 81.

[24] Lowman, *op. cit.* at 190-2.

[25] *Ibid.*, at 209.

[26] Lautt, *Prostitution in the Prairies* WPPP#9 at 86-7.

[27] Lowman, *op. cit* at 190.

[28] *Ibid.*, 190.

[29] Lautt, *op. cit.* at 91.

[30] Lowman, *op. cit.* at 216-8.

[31] *Ibid.*, at 199 and 205.

[32] Lautt, *op. cit.* at 29.

[33] *Ibid.*, at 38 and 13.

[34] *Ibid.*, at 31.

[35] *Ibid.*, at 38.

[36] Lowman, *op. cit.* at 204.

[37] Lautt, *op. cit.* at 34.

[38] *Ibid.*, at 91.

[39] Lowman, *op. cit.* at 246.

Section II

Prostitution and the Law

Summary

In Section II, the Committee examines the law relating to prostitution in Canada. Chapter 29 begins with a short introduction to the historical evolution of the criminal law surrounding this form of conduct and is followed by an analysis of the current *Criminal Code* provisions on prostitution-related activity. Attention is directed in Chapter 30 to the more general provisions of the criminal law and their impact on prostitution. Chapter 31 addresses the control and regulation of prostitution by provincial and municipal law. The actual and potential impact of the *Charter* on the law relating to prostitution is examined in Chapter 32, and international conventions and agreements on prostitution, and Canada's position in relation to them, in Chapter 33. The Section closes with Chapter 34 in which consideration is given to recent legislative proposals for changes in the law relating to prostitution in Canada.

Chapter 29

The Prostitution-Related Offences in the Criminal Code

1. Introduction

The earliest provisions in Canadian criminal law relating specifically to prostitution dealt with bawdy houses and street walking.[1] The bawdy house provisions which were "received" from England made it an offence to "keep" a bawdy house (typically a brothel). However, unlike the parallel English law, they also embraced both being an inmate of or one "found in" (a customer in) a bawdy house. The law on streetwalkers which developed from more general provisions on vagrancy made it an offence to be a prostitute or streetwalker "not giving a satisfactory account of [herself]".

In the 1860s, in the wake of concern in official circles in Britain about the supposed connection between prostitutes, venereal disease and demoralization in the armed forces, Canada, following the British lead, introduced a regulatory regime which made it possible for prostitutes to be subjected to medical inspection and, if found to be diseased, detained for compulsory treatment in a certified hospital. However, in Canada the legislation was rarely enforced and was soon allowed to lapse.[2]

In all of this early legislation, with the partial exception of the bawdy house provisions, the emphasis of the law was on penalizing the prostitute. The philosophy seems to have been that the male population was entitled, without sanction, to seek the services of prostitutes, but insofar as the morality or health of the community might be compromised by such activity, the target of the law was properly the purveyors and not the customers of the business.

In the late 19th and early 20th century, the emergence of a more paternalistic concern on the part of the legislators with the protection of girls and young women from the ravages of vice, often associated with the alleged scourge of "white slavery", led to the addition of a series of provisions which had the protection of "virtuous womanhood" as their objective. These included a litany of offences proscribing procuring, and "living on the avails" of prostitutes. Together with the earlier streetwalker and bawdy house offences, they were included in the Canadian *Criminal Code*.[3]

Largely as a result of the efforts of women involved in the so-called "social purity movement", legislation designed both to rehabilitate prostitutes and to prevent children opting for that way of life was also enacted across the country at the provincial level. These regimes, which allowed for special detention orders for prostitutes and the removal of female adolescents from their own homes, were often as repressive in application as the streetwalking provisions.[4]

The dual elements in the thinking of lawmakers of the prostitute as both moral and legal outcast, and the need to protect respectable women from the wiles of perverse males, has continued to influence the law and its enforcement through the 20th century. The bawdy house provisions, with their uniquely Canadian focus on keeper, prostitute and customer, remain in the *Criminal Code* in sections 193 and 194. The purely status offence of streetwalking was retained in the *Code* until 1972 when it was replaced by the present soliciting provision, section 195.1.[5] The list of procuring offences continues to exist in section 195(1) of the *Code*, subject to recent changes which extend their application to both males and females.[6] Although the special regulatory regimes designed to deal with the public health or morals problems caused by prostitution are now historic memories, more general legislation on public health and child welfare exists which provides the possibility of regulatory control over prostitution and its side effects.

In analyzing Canadian criminal law as it relates to prostitution, it is important to recognize that prostitution itself is not an offence. With the repeal of the old streetwalker section in 1972 (commonly known as the "Vagrancy" or "Vag. C" provision), being a prostitute on the street ceased to be an offence. Section 193 still contemplates an inmate of a bawdy house being charged. However, nowhere is the act of prostitution, or engaging in sexual services for reward, in and of itself proscribed. It is, of course, possible that acts of prostitution will be caught under other sections of the *Code*, for example, as gross indecency under section 157. However, it will normally be the act of indecency which is the focus of the prosecution in that instance, rather than the fact that it also involves prostitution.

The *Criminal Code* concerns itself with some of the circumstances in which prostitution takes place and is encouraged, and several of its side effects. More specifically it addresses three types of problems, namely:

> the institutionalization and commercialization of prostitution: the bawdy house offences;
>
> the general promotion of prostitution and the control and manipulation of prostitutes: procuring and living on the avails;
>
> the public nuisance effects of street prostitution: street soliciting.

Furthermore, insofar as prostitution and its practice have criminal law consequences, the latter are no longer confined in their application to the female prostitute.[7]

2. The Bawdy House Offences

The bawdy house provisions are found in sections 193, 194, 179, 180 and 181 of the *Code*.

> 193. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) Every one who
>
> (a) is an inmate of a common bawdy-house,
>
> (b) is found, without lawful excuse, in a common bawdy-house, or
>
> (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
>
> is guilty of an offence punishable on summary conviction.
>
> (3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served upon the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.
>
> (4) Where a person upon whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person upon whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.
>
> 194. Every one who knowingly takes, transports, directs, or offers to take, transport, or direct any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.
>
> 179. (1)
>
> "common bawdy-house" means a place that is
>
> (a) kept or occupied, or
>
> (b) resorted to by one or more persons
>
> for the purpose of prostitution or the practice of acts of indecency;
>
> "disorderly house" means a common bawdy-house, a common betting house or a common gaming house;
>
> "keeper" includes a person who
>
> (a) is an owner or occupier of a place,
>
> (b) assists or acts on behalf of an owner or occupier of a place,
>
> (c) appears to be, or to assist or act on behalf of an owner or occupier of a place,
>
> (d) has the care or management of a place, or
>
> (e) uses a place permanently or temporarily, with or without the consent of the owner or occupier;
>
> "place" includes any place, whether or not
>
> (a) it is covered or enclosed,
>
> (b) it is used permanently or temporarily, or
>
> (c) any person has an exclusive right of user with respect to it.
>
> "prostitute" means a person of either sex who engages in prostitution;

"public place" includes any place to which the public have access as of right or by invitation, express or implied.

180. (1) In proceedings under this Part,

(a) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house;

(d) evidence that a person was convicted of keeping a disorderly house is, for the purpose of proceedings against any one who is alleged to have been an inmate or to have been found in that house at the time the person committed the offence of which he was convicted, in the absence of any evidence to the contrary, proof that the house was, at that time, a disorderly house.

181. (1) A justice who receives from a peace officer a report in writing that he has reasonable ground to believe and does believe that an offence under section 185, 186, 187, 189, 190 or 193 is being committed at any place within the jurisdiction of the justice may issue a warrant under his hand authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 185, 186, 187, 189, 190 or 193, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before him or before another justice having jurisdiction, to be dealt with according to law.

(3) Except where otherwise expressly provided by-law, a court, judge, justice or magistrate before whom anything that is seized under this section is brought may declare that the thing is forfeited, in which case it shall be disposed of or dealt with as the Attorney General may direct if no person shows sufficient cause why it should not be forfeited.

(4) No declaration or direction shall be made pursuant to subsection (3) in respect of anything seized under this section until

(a) it is no longer required as evidence in any proceedings that are instituted pursuant to the seizure, or

(b) the expiration of thirty days from the time of seizure where it is not required as evidence in any proceedings.

(5) The Attorney General may, for the purpose of converting anything forfeited under this section into money, deal with it in all respects as if he were the owner thereof.

(6) Nothing in this section or in section 445 authorizes the seizure, forfeiture or destruction of telephone, telegraph or other communication facilities or equipment that may be evidence of or that may have been used in the commission of an offence under section 185, 186, 187, 189, 190 or 193 and that is owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of such a person.

2.1 Keeping a Bawdy House, Being an Inmate or Found in

Section 193(1) makes it an indictable offence for anyone to keep a common bawdy house, with a maximum of two years imprisonment. Section 193(2) creates three different summary conviction offences:

(a) being "an inmate of a common bawdy house" (s.193)(2)(a);

(b) being "found without lawful excuse, in a common bawdy house" (s. 193(2)(b));

(c) "as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place knowingly "permitting" the place or any part thereof to be let or used for the purposes of a common bawdy house" (s. 193(2)(c)).

Section 193(3) requires that notice of a conviction under section 193(1) (the "keeping" offence) be served on "the owner, landlord, or lessor of the place in respect of which the person is convicted or his agent". The owner, landlord or lessor may fail to exercise any right which he has to end the tenancy or right of occupation of the person whose conviction prompted the notice. By virtue of section 193(4), such failure will result in the owner, landlord or lessor being "deemed to have committed an offence under subsection (1) the "keeping" offence, if a subsequent conviction takes place under that subsection concerning the same premises. The owner, landlord or lessor will only avoid this result if he can prove "that he has taken all reasonable steps to prevent the recurrence of the offence".

The term "common bawdy house" is defined in section 179(1) of the *Code* to mean "a place that is (a) kept or occupied, or (b) resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency". The word "place" in turn is defined to include "any place, whether or not (a) it is covered or enclosed, (b) it is used permanently or temporarily, or (c) any person has an exclusive right of use with respect to it". This is a very extensive definition which covers a far greater range of establishments than the traditional brothel, embracing even very transitory locales, such as parking garages or lots.[8]

There are also three ancillary provisions in sections 180 and 181 which relate to the bawdy house offences. Section 180(1) provides that "evidence that a peace officer who was authorized to enter a place was wilfully obstructed or delayed in entering it, in the absence of any evidence to the contrary, is proof that the place is a disorderly house". The latter term includes a "common bawdy house" (s.179(1)). Section 180(1)(d) creates a further presumption by stipulating that, in any proceedings against any person under section 193(2)(a) (being an inmate) and section 193(2)(b) (being a found in), evidence that a person was convicted under section 193(1) (keeping a common bawdy house) in respect of the same premises is, "in the absence of any evidence to the contrary", proof that the premises were a common bawdy house. It is a requirement that both charges arose out of the same set of events.

Finally, section 181 makes provision for the seizure of evidence from, and the arrest of people found in, premises being used as a bawdy house or that police believe are being used as such. Section 182 and 183 which empowered the police to enter and search a common bawdy house for a female suspected of being therein and to question both her and her keeper under oath were repealed in 1982.[9]

In order to secure convictions under section 193, it is first necessary for the Crown to establish that the premises in question were a common bawdy house. Judicial interpretation of the definition in section 179(1) has produced the following results:

(a) premises used by only one person for the purposes of prostitution or the practice of acts of indecency can constitute a common bawdy house.[9] This means that the single prostitute operating out of her own residence is open to prosecution under section 193(1);

(b) where premises contain several rooms, it is not essential that every one be used for purposes of prostitution or acts of indecency for the establishment to be characterized as a common bawdy house. Nor does a particular room have to be used exclusively for the offending purposes to qualify;[10]

(c) the premises must have been used habitually for the purpose of prostitution or the practice of acts of indecency.[11] Consequently, proof of a single act or even a small number of acts on a single evening would not be sufficient to warrant a finding that the premises were a bawdy house;

(d) "prostitution" is the offering by a person of his or her body for lewdness for payment in return.[12] Sexual intercourse is not required. Thus the masturbation of men by women working at massage parlours has been held to constitute prostitution;[13]

(e) "practice of acts of indecency" embraces a similarly wide range of sexual practices. In recent lower court decisions, the tendency has been to apply a "community standard of tolerance". Thus in an Ontario decision, the activities of a heterosexual group sex club were found not to offend that standard.[14] The average reasonable person, it was concluded, would be ready to tolerate such activity, at least where no attempt is made to proselytize and the owner is careful about the ages and sensibilities of those invited to participate. By contrast, much to the concern of the gay community, successful prosecutions have been brought against the owners, operators and employees of gay bars, health spas and steambaths at which sexual acts take place.[15]

Section 158(1) of the *Code* creates a defence to charges of buggery and gross indecency under section 155 and 157 respectively in the case of "any act committed in private" between "a husband and his wife" or "any two partners each of whom is twenty-one years or more of age, both of whom consent to the commission of the act". This defence does not extend to "acts of indecency" under section 193 even though those acts take place in private.[16]

In determining whether the Crown has satisfied the onus of proving that the place in question was a common bawdy house, the court will look at such factors as: the view of the accused; the reputation of the establishment in the community; the character, appearance and conduct of those frequenting it; hours and frequency of visits, and whether agreements were made between inmates and visitors. Proof that sexual conduct took place on the premises is not essential, although it obviously helps.[17]

Under section 193(1) the Crown not only has to prove that the establishment was a common bawdy house, but also that the accused was "keeping" it as such. The latter term is not defined in the *Code*, although the noun "keeper" is. According to section 179(1) that term includes: the owner or occupier; one assisting or acting on behalf of the owner or occupier; or, one actually acting or appearing to act on behalf of the owner or occupier. The courts have rejected the argument that the definition in section 179 applies to the term "keeping" on the ground that reference to temporary use in section 179 overlaps with two of the offences in section 179(2), i.e. being an inmate or found in. To apply the broader term would, therefore, make these clauses superfluous. The essence of "keeping" is that a person provides accommodation.[18] It is also clear that the accused must be aware that the place "kept" was being used for prostitution or acts of indecency.[19] If he is aware that the premises are being "kept" by someone else, for example a tenant, for these purposes, the lesser offence in section 193(2)(c) is available.

In the case of the operator of a hotel or motel, the fact that a sole prostitute resorts to it for the purpose of prostitution does not convert the whole establishment into a bawdy house. However, if the operator is aware that prostitution is taking place in the establishment and the use is habitual, the establishment or part of it may be so characterized. The prostitute may also be charged with "keeping", but only if there is evidence of frequent use of a particular room.[20]

The three summary conviction offences in section 193(2) have given rise to few reported cases. No cases deal with the matter of being a found in (s. 193(2)(b)). The only reported case on being an inmate (s. 193(1)(a)) establishes that "inmate" means "inmate for the purposes of prostitution", meaning someone actively involved in prostitution.[21] The offence in section 193(2)(c) of being "owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of the place" and "knowingly [permitting] the place or any part thereof to be let or used for the purposes of a common bawdy house" has also received little attention. It is, however, the view of the courts that merely being an owner of such premises is not enough. He must also have "charge or control" of them. The person caught is the one:

> who has the right to intervene forthwith and prevent the continued use of the premises as a common bawdy house and whose failure to do so can be considered as the granting of permission to make use of the premises as and from the time he gained knowledge [of the activities].[22]

The courts have demonstrated considerable caution in applying the presumptions contained in sections 193 and 180. In *R.* v. *Jacobs*[23] the British Columbia Court of Appeal refused to apply the presumption in section 193(4) where an agent of a landlord gave the tenant, whose conviction under section

193(1) had been registered, notice to quit but failed to follow it up. In dealing with the presumption in section 180(1)(a), the wilful obstruction or delay of a peace officer must be firmly established by the prosecution.[24] Even then it seems that the accused merely has to raise a reasonable doubt as to whether the premises in question were a common bawdy house. This would also be true in the case of the presumption against the alleged inmate or found in contained in section 180(1)(d).[25]

2.2 Transporting to a Bawdy House

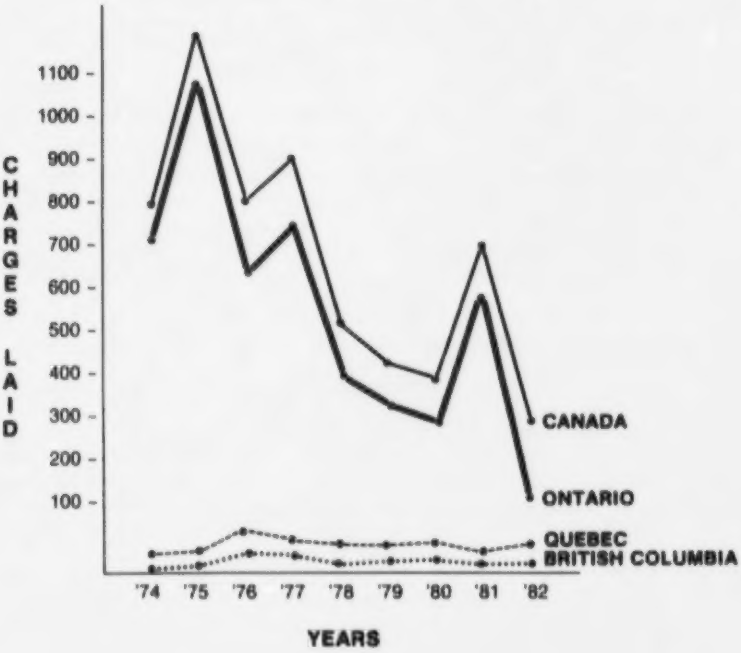
Section 194 makes it an offence, punishable on summary conviction, for any person to knowingly take, transport, direct, or offer to take, transport or direct any other person to a bawdy house. This section has not been the subject of any reported cases. It seems to have been designed to deal with taxi drivers servicing the "trade", although its terms are broad enough that it could be applied to rather more innocent and random behaviour, such as directing someone to a bawdy house on request.

2.3 Problems of Application and Enforcement and Criticisms of the Present Law

The crime statistics put out annually by Statistics Canada reveal that between 1974 and 1982 (the last year for which statistics are available), the bawdy house offences which were the subject of charges by the police fluctuated between a high of 1,143 in 1975 and a low of 269 in 1982. The figures for the individual jurisdictions produce the interesting fact that enforcement varied in intensity across the country. (See Figure 1) Few, if any, charges were laid under the bawdy house provisions of the *Code* in the Maritime provinces. Despite similar population figures for Ontario and Québec, the figure for charges was consistently from five to ten times higher in the former than in the latter. In the West, the majority of the charges were laid in British Columbia and Alberta, but were proportionally much lower than in Ontario. As with the Maritimes, there was very little activity in the northern Territories.

In the absence of a detailed study of enforcement patterns, and, in particular, of the application of both resources and enthusiasm by certain police forces across the country, it is difficult, if not impossible, to explain these annual and regional variations. All that can be offered are speculative comments. The regional studies on prostitution, commissioned by the Department of Justice for the Committee, do reveal differences in police attitudes towards bawdy houses. The reports relate typically to massage and body rub parlours, which seem to be the most common form of institutional bawdy house these days. In the Maritimes, the attitude of the police is that they will not intervene unless they receive complaints from the public, suspect that other forms of criminal activity are taking place on the premises, or are inspired by the desire of Revenue Canada to tax "the wages of sin". As the researcher in the Maritimes reported, apart from the exceptional situations noted "this form of prostitution is tolerated by formal control agencies in the Atlantic provinces".[26] By contrast, although the police interviewed in Ontario claimed that the massage and body rub business had declined significantly in that province since 1970, where they do operate there is concern that they are often fronts for sinister interests, such as the Mafia, and thus need to be charged and put out of business.[27]

Figure 1 — Charges for Bawdy House Offences 1974-82 (Statistics Canada)



A further possible explanation for the variation in the statistics may be differences in the policies of particular communities towards these establishments. In certain cities, Montréal and Calgary for example, they are effectively outlawed by local by-laws, while elsewhere they may operate with little interference. Whatever the reasons, the statistics provide evidence of variations in police and prosecutorial practice, which raises questions about the resolve of enforcement authorities in this area of the criminal law, and whether the running and inhabiting of bawdy houses is clearly seen as a "national problem".

It is agreed by the police that the enforcement of the law on bawdy houses is a time consuming and expensive process. Typically, to sustain a charge the police will have to "stake out" the establishment over a period of time to establish a pattern of use, and then use undercover techniques to implicate the operator or user of the premises. The complicated character of these operations can be seen in the research study done for the Committee in Québec:

> In order for a place to be considered a common bawdy-house there must be evidence of constant comings and goings (the number of people who arrive and depart and the duration of their visits) and proof that these comings and goings are frequent (several prostitutes and clients daily and the same prostitute on many occasions during the whole observation period, with a three-day minimum), and that sexual services are offered there for remuneration.
>
> Such evidence is gathered mainly by observation (notes on arrivals and departures) and/or by "tailing" suspects. Generally, photographs are taken of the prostitutes and, particularly, of the clients who come and go. Clients' licence plates make it possible to obtain their names and addresses. Once the raid has been conducted, the clients are contacted as witnesses: their photographs, taken in front of the common bawdy-house, encourage the most reluctant clients to admit having had sexual relations with a particular person, for a particular fee, on the date and at the time in question.
>
> Sometimes the clients may be driving service vehicles or company cars. Since the same vehicles might be used by several people, and since the client cannot be identified from the licence plates, a more direct form of identification is required. If the raid is planned within a short period and if there is no risk of the police presence being divulged, the client is intercepted coming out of the common bawdy-house. Otherwise, the client's vehicle is identified to highway-patrol officers in marked cars who intercept it on the grounds of a possible traffic violation which permits them to obtain the driver's identity.
>
> Additional evidence about how establishments are run and about the identity of the main keepers is obtained through infiltration. One or more police-officer couples (male and female officers) are assigned as a client and prostitute to obtain inside information. In general, a contract with a police officer is sufficient evidence. An officer acts as a client with an actual prostitute. He hands over marked bills in payment for her services. Once the money has been handed over, and before the sexual relations takes place, his colleagues — stationed outside — carry out the raid as planned.[28]

This process can be further complicated by the guile of the suspect. Those who operate institutional bawdy houses often try to insulate themselves from attack by charging a fee for legitimate services, ostensibly leaving it to the operative and customer to agree on "ancillary services". Moreover, as revealed by police interviewed by the reseacher into prostitution in the Prairies, the problems of gaining the necessary evidence against prostitutes using premises are aggravated by their tactics in switching keys with each other and thereby avoiding the use of the same room more than once or twice a night.[29] The Edmonton police, in a letter to the Committee, noted that their problems were enhanced because the courts had rejected the element of habitual use in the case where a date rents a hotel room and then turns the key over to a prostitute to use for the rest of the day. The Québec research report on prostitution points out that

> owners or managers of common bawdy houses will go as far as refusing to rent a prostitute a room more than once daily. This way they can claim they did not know the person was a prostitute, that they believed he or she was a regular, but ordinary, customer.[30]

In addition to the problems of variable enforcement and the difficulties in constructing a firm case for the prosecution, there are several problems of principle with the provisions. In light of the fact that neither prostitution nor being a prostitute is a crime, it may be questioned why, in Canadian law it is still an offence to be an inmate of or a customer found in a bawdy house. The retention of these offences seems to contradict the distinct tendency of the criminal law in modern times not to penalize sexual conduct, even when paid for, which takes place in private. The same argument may also be made in relation to the prostitute operating out of her own residence. Whatever the possible objections to commercialization of prostitution, they have no obvious reference to the conduct of the individuals engaged in acts of prostitution.

A second claim relates to the legislative presumptions, or "reverse onus" clauses applied in bawdy house cases. In the first place, it is questionable whether section 180(1)(a) will survive challenge under the *Charter*, in particular under section 11(d), which reads: "Any person charged with an offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal". In challenges to reverse onus clauses so far, the courts have made it clear that a clause will be struck down unless the presumed fact can be rationally linked to the proven fact or facts.[31]

It is difficult to see how the character of a disorderly house can be presumed from the failure to grant entrance to a peace officer. The provision in section 180(1)(d) which presumes that the accused is an inmate or found in of a disorderly house when another has been convicted of "keeping" that establishment, is also suspect. While it does not offend the above principle, it does contradict another basic notion, that proof of fact in one proceeding is not proof of it in another. Accordingly, it may well contravene section 11(d) of the *Charter*, the presumption of innocence provision, or section 7 which contains the right not to be deprived of life, liberty or property except in accordance with the principles of fundamental justice.

3. The Procuring and Pimping Offences

3.1 Procuring

Section 195(1) of the *Criminal Code* enumerates nine different offences relating to procuring. The subsection reads:

> Everyone who
>
> (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
>
> (b) inveigles or entices a person who is not a prostitute or a person of known immoral character to a common bawdy house or house of assignation for the purposes of illicit sexual intercourse or prostitution;
>
> (c) knowingly conceals a person in a common bawdy house or house of assignation;

> (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
>
> (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy house, with intent that the person may become an inmate or frequenter of a common bawdy house, whether in or out of Canada,
>
> (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy house or house of assignation,
>
> (g) procures a person to enter or leave Canada, for purposes of prostitution,
>
> (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
>
> (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupify or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person,...
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.

The offences listed in section 195(1) can be committed by either males or females. Proceedings in respect of them must, by virtue of section 195(4), be commenced within one year of the time when the offence is alleged to have been committed. Moreover section 195(3) provides that in the case of each of these offences "no person shall be convicted... upon the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused." Although, as the penalty provision suggests, these are considered to be serious offences, the original framers of the provision seem to have harboured doubts about the veracity or trustworthiness of some of those who might be expected to come forward and complain that they had been victims of this sort of conduct.

Several, but by no means all of the provisions on procuring have been subject to judicial interpretation in reported cases with the following results:

(a) the word "procures" in section 195(1)(a) requires that the accused has taken an active part in bringing the two people together. Thus a taxi driver who merely drove one party to meet another was found not guilty of procuring.[32] Just how active a part is uncertain, as shown in conflicting decisions over whether taxi drivers who actually arrange liaisons are caught by the provision;[33]

(b) "illicit" in section 195(1)(a) has been given a broad interpretation by appeal courts in both British Columbia and Ontario.[34] As the British Columbia court said, the term is used in the sense of "not being sanctioned or permitted by-law and not necessarily in the sense of constituting a criminal offence";

(c) it is necessary to prove under section 195(1)(a) that "illicit sexual intercourse" actually took place, but this requirement may be circumvented by laying the alternative charge of attempting to procure;[35]

(d) the separate offence of attempting to inveigle or entice may be read into section 195(1)(b).[36] Presumably the same argument could be made in relation to clauses (c), (f), (g), (h) and (i);

(e) to secure a conviction under section 195(1)(d), procuring or attempting to procure a person to become a prostitute, it is essential to establish that the accused intended to convert an "innocent" person to prostitution. Thus the Alberta Court of Appeal in *R*. v. *Cline* [37] acquitted a man on a charge under this clause when it was shown that the woman in question was an undercover police woman posing as a prostitute from another city. The court held that the accused lacked the necessary intent.

Clauses (c), (e), (f), (g) and (h) have not been the subject of interpretation in reported cases. With the exception of clause (h), exercising control, direction or influence, there is no evidence that charges are laid under the other categories.[38]

3.2 Living on the Avails

> 195. (1) Everyone who...
>
> (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and is liable to imprisonment for ten years.

Section 195(1)(j) "living on the avails" (normally described as "pimping") is, by comparison with some of the procuring offences, utilized frequently. Moreover, it has given rise to a number of reported decisions which have attempted to clarify its purpose.

The term "living on" has been construed to mean "living parasitically on". As the British Columbia Court of Appeal commented in *R*. v. *Celebrity Enterprises Ltd.*[39] which involved a charge of conspiring to live on the avails against a night club which collected an admission fee from every prostitute using its facilities for meeting clients:

> in order that a male may live on the avails of prostitution of another person who is a female the male must at least receive either in kind all or part of the female's proceeds from prostituting herself or have those proceeds applied in some way to support his living. It is her avails he must live on, indirect benefits resulting to him from her practising prostitution are not avails of her prostitution.[40]

The evidence in that case did not warrant such a conclusion and the charge was dismissed. By the same token, anyone providing commercial or professional services, for example, a tradesman, doctor or lawyer, to a prostitute, cannot be characterized as living on the avails.

Less clear is whether a single payment is sufficent to found a conviction. While decisions in Saskatchewan and British Columbia seem to conflict on this point, the conflict may be more apparent than real because in the B.C. case, in which a conviction was sustained, there was evidence that the accused lived or consorted with prostitutes.[41]

Although the Québec Court of Appeal in *R.* v. *Fisette* [42] concluded that proof of the actual use of the avails for living is crucial to a finding of guilt, the decisions of other courts are inconsistent with this.[43]

The application of the presumption in section 195(2) raised by evidence of the accused living with or being habitually in the company of prostitutes, has also commanded attention from the courts. Indeed, there is disagreement between the Courts of Appeal in British Columbia and Ontario over whether the accused has to adduce evidence to counter the evidence of consorting led by the Crown. The Ontario view, which denies that this is a requirement, seems more in tune with general judicial caution towards presumptions of this kind. It is quite possible that the Crown's evidence will itself contain weaknesses which leave a reasonable doubt in the mind of the court.[44]

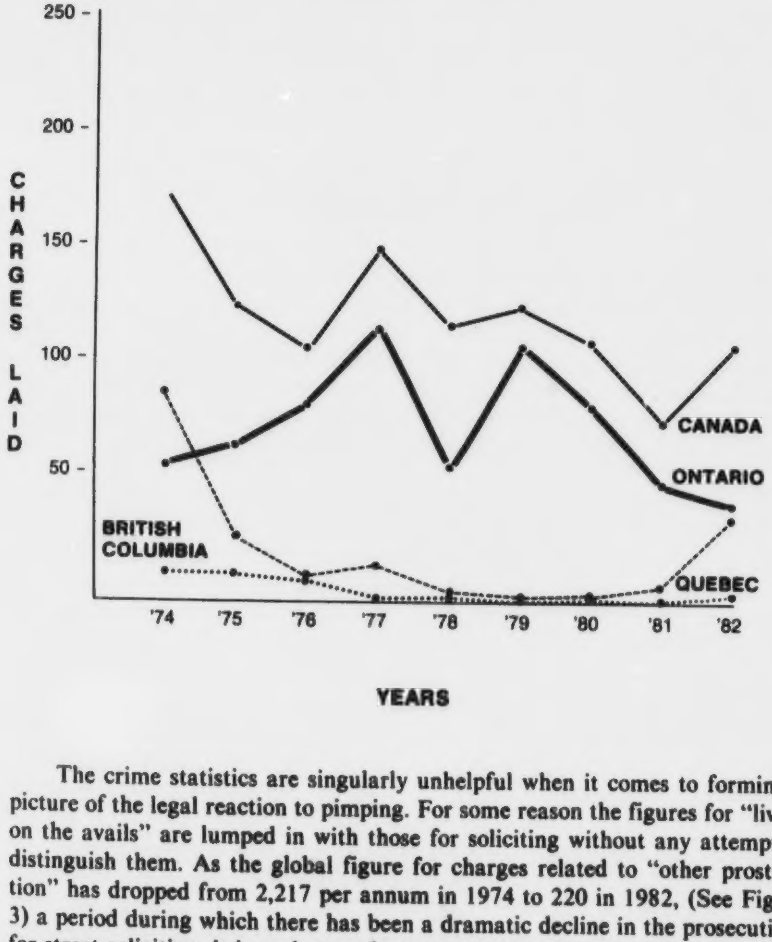
Despite the fact that the subsection refers to the company of "prostitutes", which has led some counsel and one court to suggest that the presumption does not apply where the evidence is that the accused lived or consorted with a single prostitute, the weight of authority seems to run in the opposite direction.[45] The word "habitually" in the presumption provision has been interpreted to mean that the accused was in the company of a prostitute or prostitutes "for the most part".[46] As long as the period of contact is significant there is no requirement of continuous liaison. This interpretation obviously facilitates the use by the Crown of the presumption.

Unlike the procuring offences subsections (3) and (4) of section 195 do not apply to "living on the avails".[47]

3.3 Problems of Application and Enforcement and Criticisms of the Present Law

Procuring, despite its elaborate treatment in the *Criminal Code*, is not an offence under which a significant number of charges are laid in Canada. (See Figure 2) The crime statistics of Statistics Canada show that the figure for the whole of Canada between 1974 and 1982 fluctuated between 100 and 200 charges per annum. As in the case of the prosecution of bawdy house offences, Ontario accounts for the majority of the charges laid. The offence is an unattractive one to the police and prosecutors for a variety of reasons. In the first place, a number of the clauses of section 195(1) seem to have little relationship to the realities of prostitution in the late twentieth century. Secondly, even where the offence and the facts fit, the requirement of corroboration is often a difficult one to satisfy. The result is that, if the facts are favourable, the alternative charge of living on the avails will also be laid and pursued with more vigour. Thirdly, the one year limitation period on prosecution of procuring offences may present a bar to prosecution even if the other difficulties can be surmounted.

Figure 2 — Charges for Procuring 1974-82 (Statistics Canada)



The crime statistics are singularly unhelpful when it comes to forming a picture of the legal reaction to pimping. For some reason the figures for "living on the avails" are lumped in with those for soliciting without any attempt to distinguish them. As the global figure for charges related to "other prostitution" has dropped from 2,217 per annum in 1974 to 220 in 1982, (See Figure 3) a period during which there has been a dramatic decline in the prosecutions for street soliciting, it is perhaps safe to assume that the figures for "living on the avails" have fallen somewhere between those for procuring and for the bawdy house offences, and perhaps closer to the former.

Although the successful prosecution of this offence does not require corroboration, police authorities are agreed that enforcement is difficult; the activities of pimps are sufficiently clandestine in most instances that it is only when a complaint is lodged by a prostitute who has been badly mistreated and is willing to testify, that there is any chance of securing a conviction. Even when, as sometimes occurs, the police use surveillance methods to develop an adequate evidential basis to lay a charge, they are often frustrated in the result. As a police officer interviewed by the researcher on prostitution in the Prairie region put it:

> Charging pimps is a time consuming and expensive task. With one guy, it took me eight months of fairly constant surveillance to obtain one successful charge against a pimp. Another one, ****, was recently given two and one-half years for living off [sic] the avails. It took fourteen months of surveillance to get him. Add to that the time spent for the police keeping track of victims that are going to testify. We had one recent case where we were ready to take the case to trial, and the key witness ended up in a psychiatric ward.[48]

The reality, then, is that it is normally only in the case of an ongoing saga of violence and its threat that conditions are created in which the police are likely to act.

At the level of institutional prostitution, the charge of living on the avails is sometimes brought against escort and dating services. Unlike the massage parlour or body rub establishment, which occupies premises which the customer visits, these services go to the clients. Accordingly, it is not possible to utilize the bawdy house provisions. The same difficulties noted in the case of bawdy house prosecutions exist in these cases. The cost of getting the necessary evidence is high, and often is not justified by the outcome.

In the study of prostitution undertaken in Ontario, the researchers concluded, on the basis of their discussions with police representatives, that "[t]his type of operation often requires many extra man-hours and the additional use of wire taps and other forms of electronic surveillance. It is not uncommon for a $250,000 operation to warrant ten thousand dollars in fines".[49] Furthermore, as the equivalent study done in British Columbia points out, convictions are often difficult to secure at all because the operator will argue, often with success, that all he or she does is to introduce the parties, an arrangement which has no sexual connotations. It is only after the parties have met that the sex-for-money bargain is made, allegedly without the proprietor's knowledge.[50]

The overall difficulties of enforcement in these cases are summed up most graphically in the Québec report on prostitution:

> Obtaining evidence on dating, escort, hostess and modelling agencies, and photo studios or networks of "call-girls" or "call-boys", is much more complicated. Unless electronic bugging is used, telephone calls are not very revealing because the operators of such businesses are often very experienced and very careful about what they say over the telephone. Clients must come to the agency where, generally, no prostitution takes place. The staff there act as facilitators for prostitutes who are "members" of the agency. The client is put in contact with the prostitute by telephone or by bell-boy, and a meeting place is arranged, but always at a differet location.

> Unless there is actually prostitution at the agency, or unless one or more prostitutes regularly provide their services at the same location, it is impossible to establish evidence of common bawdy-house against the prostitutes. Efforts are mainly made to arrest the facilitator people for procuring. Electronic bugging generally makes it possible to prove that the agency staff have some degree of control over what is going on. What is difficult to prove is that these facilitators receive a share of the proceeds.[51]

At the level of principle, it is likely that similar to its counterparts in the bawdy house provisions, the reverse onus clause in section 195(2) will be subject to challenge under the *Charter*. This subsection presumes the fact of living on the avails from the accused residing with or being habitually in the company of prostitutes. Although there may be a rational link between the presumed fact and living with prostitutes, it is doubtful whether the same can be said of the supposed connection produced by being habitually in their company. As in the case of the reverse onus clause in section 180(1)(a), this provision would offend "the right to be presumed innocent" in section 11(d) of the *Charter*.

4. The Street Prostitution Offence

4.1 Soliciting

> 195.1 Every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction.
>
> 179.(1) "public place" includes any place to which the public have access as of right or by invitation, express or implied.

Section 195.1 which replaced the previous street walker or "Vag. C" provision makes "every person who solicits any person in a public place for the purpose of prostitution" guilty of a summary conviction offence. The main reason for the change in the law in 1972 was that increasing opposition had been voiced over the maintenance of a status offence which discriminated against women.[52] The substitution of an offence which emphasized the element of soliciting was an attempt, it seems, to characterize the public manifestations of prostitution as a form of nuisance.

The provision is typically vague in substance, and it has been left to the courts to give it meaning. The primary issue presented to the courts was the meaning to be ascribed to the term "solicits". The Supreme Court of Canada addressed the matter in *R.* v. *Hutt* in 1978.[53] In that case, an undercover police officer operating from a car stopped the vehicle close to the accused. After the two smiled at each other, the accused got into the car with the agreement of the officer and inquired whether he wanted a girl. He agreed and proceeded to drive the car to a nearby hotel parking lot where the accused was arrested. The court decided that Ms. Hutt had not been guilty of soliciting. The majority determined that the word "solicits" involves a necessary element of "importuning" which means "to solicit pressingly or persistently". Here there had been nothing "pressing or persistent" about the accused's conduct. In speaking for the majority, Justice Spence indicated that it had been the intent of Parliament in changing the law on street prostitution to concentrate on acts which contribute to the public inconvenience.[54]

Exactly what amounts to "pressing or persistent conduct" is still uncertain. The subsequent Supreme Court decisions in *Whitter* and *Galjot*[55] have shed some light insofar as it was made clear that it is not "pressing or persistent" if a prostitute approaches a number of individuals in sequence with a single entreaty to each. In other words, there has to be evidence of a pattern of annoyance directed at one individual. This further refinement still leaves doubt as to the type and intensity of conduct which is required. Although Justice Spence was of the opinion that it was not necessary to prove that the accused in the *Hutt* case engaged in conduct which was "troublesome, worrying, pestering or annoying", law enforcement authorities have been inclined to assume that such conduct is essential.

In addition to construing the word "solicits" in *R.* v. *Hutt*, Justice Spence, although it was not germane to the decision in that case, indicated that in his opinion the undercover officer's car could not be characterized as a "public place", as required by section 195.1.[56] This opinion has added to the general uncertainty surrounding the scope of the provision and of the definition in section 179(1), and is in conflict with the interpretation given by other courts to the same term in section 138 which applies to Part IV of the *Code*.[57]

The omnibus bill (Bill C-19) introduced early in 1984 by the then Minister of Justice, The Honourable Mark MacGuigan, attempted to cure this problem by making it clear that the term "public place" embraces a motor vehicle in a public place. The present wording of the definition and its reference to places to which the public have access by invitation, express or implied, means that it embraces a wide range of off street premises, such as bars, restaurants and hotel lobbies.

Another controversy over the meaning of the section has been whether a customer as well as a prostitute can be charged with soliciting. While the British Columbia Court of Appeal has concluded that the wording "solicits...for the purpose of prostitution" cannot have been intended to catch the customer,[58] its counterpart in Ontario has reached the opposite conclusion by pointing to the use of the phrase "every one who solicits" rather than "every prostitute who solicits" in the section.[59] As neither of these decisions was appealed to the Supreme Court, the issue has yet to be resolved definitively. The omnibus bill introduced by the federal government in 1984 sought to put the matter beyond debate by making it clear that customers are open to prosecution under the section.

A recent amendment to Section 179(1) of the *Criminal Code* has put it beyond question that section 195.1 applies to both male and female prostitutes.[60]

4.2 Problems of Application and Enforcement and Criticisms of the Present Law

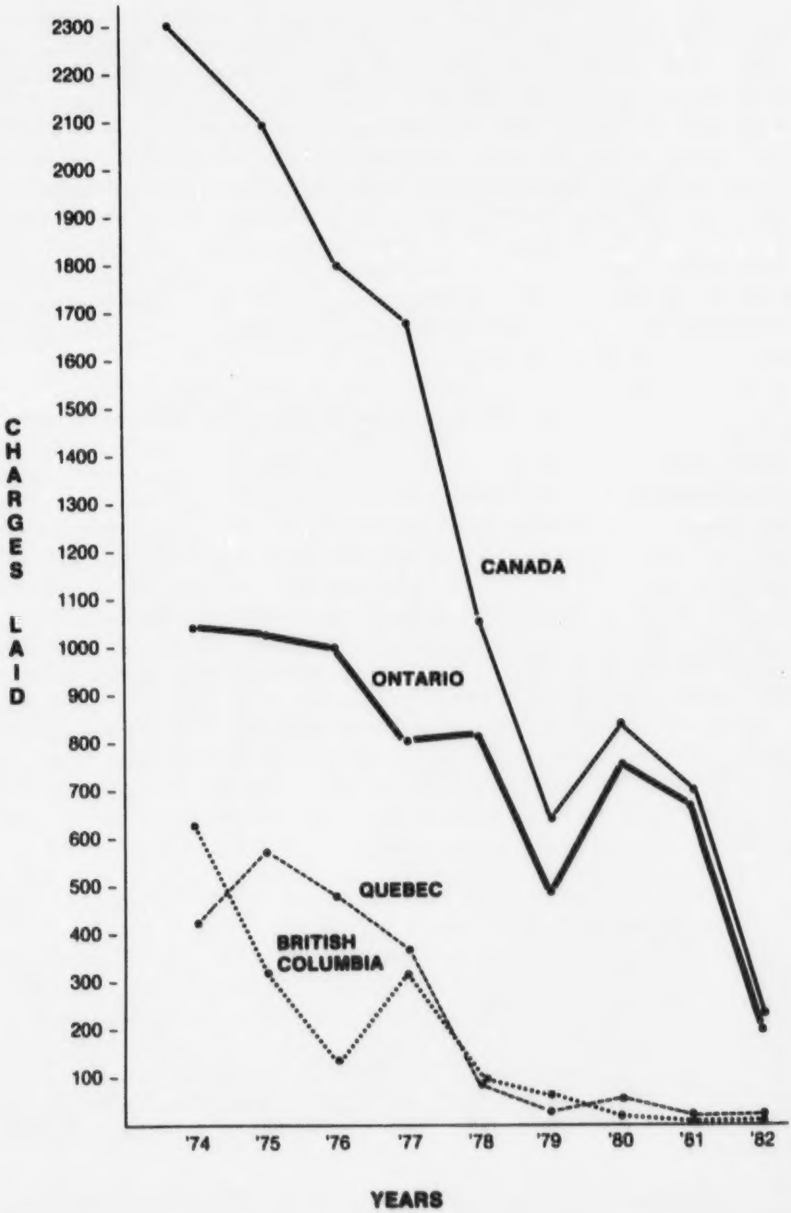
The crime statistics relating to street soliciting suffer from the same lack of precision as those for living on the avails. As the figures for the two offences are grouped together, it is impossible to establish the exact figures for each offence. What is clear is that the overall figures for charges laid by the police under this imprecise category have declined more or less steadily since 1974. (See Figure 3) The figure for that year was 2,217. It had dropped to 1,684 by 1977, and to 674 by 1979. After increasing to 843 in 1980, it fell back to 702 in 1981. In 1982 the figure declined dramatically to 220. Given the traditional difficulties with detecting and prosecuting the offence of living on the avails, and assuming that, in the absence of any change in the interpretation of the living on the avails section, the figures for that offence have remained relatively constant, the decisive downward trend in the statistics shows that soliciting has been translated from by far the more dominant element in the figures 10 year ago, to minor significance today.

As in the case of the statistics relating to the bawdy house and procuring offences, Ontario accounts for the largest proportion of cases reported or known. Interestingly, however, there was much less disparity with other of the more populous jurisdictions between 1974 and 1977, than there has been since. (See Figure 3) For example, in 1974, out of 2,217 cases in which charges were laid, Ontario accounted for 1,051, British Columbia 632, and Québec 421. The equivalent figures for 1977, out of 1,684, were 804, 312, and 372. By contrast, in 1980, out of a total of 843 cases in which charges were laid, Ontario accounted for 753, British Columbia for 11 and Québec for 54. The equivalent figures for 1981, out of a total of 702, were Ontario 676, British Columbia 0, and Québec 6. In 1982, although the overall figures had declined dramatically to 220, Ontario still represented 191 of those cases, with B.C. at 5 and Québec at 13. While the Prairie statistics show the same, but less dramatic, pattern of shrinkage as in B.C. and Quebec, the figures for the Maritime provinces and the northern Territories have remained constant, with figures below 5 per annum.

What do the statistics reveal about the fate of section 195.1 of the *Code* as an instrument for dealing with street soliciting? The first point to notice, as the research report on prostitution in Vancouver makes clear,[61] is that the decline in both cases reported or known and prosecutions begins not in 1978, as is popularly believed, but in 1974-75. The national figures for offences cleared by charge for the years 1974 to 1977 are 2,217, 2,002, 1,807, and 1,684 respectively. This suggests that even before the decision in *R.* v. *Hutt*[62], the police were finding the new street soliciting provision less satisfactory and viable than its predecessor, (the "Vag, C" section) as a response to street prostitution.

Clearly the figures dropped significantly after 1977. The figures for offences cleared by charge for the period 1978 to 1981 were 1,058, 644, 843, and 702 respectively. This decline has been associated with the pronouncement

Figure 3 — Charges for other Prostitution Offences (incl. street soliciting and living on the avails) 1974-82 (Statistics Canada)



of the decision of the Supreme Court of Canada in *Hutt* which introduced the requirement of "pressing or persistent" conduct to the offence in section 195.1 and raised doubt over whether the term "public place" includes a motor vehicle in a public place. There is no doubt that this decision and its presumed impact on lower courts had a profound effect on police and prosecutorial attitudes, being viewed by them as a substantial roadblock to successful prosecution. The statistics, however, do not show clearly that this conclusion was inevitable.

As the figures for charges set out earlier in this paragraph demonstrate, the slide between 1978 and 1981 was fitful. More instructive, however, is the fact that the figures for charges in Ontario, after dropping to 480 in 1979 from 811 in 1978, increased to 753 in 1980, and decreased to 676 in 1981. These compare with figures which hovered around the 1,000 mark between 1974-76. The statistics show that the pattern of decline was by no means constant, being much more significant in Québec and British Columbia than in Ontario.[63]

Even under the unfavourable conditions flowing from the *Hutt* decision, reactions from law enforcement authorities varied across the country. As evidence presented to and research carried out for the Committee confirms, some police forces showed greater resolution in using section 195.1, even in its revised form, than did others. On the one hand, for example, representatives of the City of Toronto indicated to the Committee that the Toronto police continued using section 195.1 regularly after 1978, and that it was only with the *Whitter* and *Galjot* decisions in 1981,[64] which ruled out conviction of a prostitute who approached a number of people in turn, that they decided that section 195.1 had become a "broken reed".[65] On the other hand, as the research study on prostitution in British Columbia shows, during the same period the Vancouver police force was prosecuting substantially reduced numbers of cases of soliciting under the street soliciting provision.[66] This variable pattern suggests that the decline in charges for soliciting, at least until 1981, had as much, if not more, to do with the dissatisfaction of some police forces with the liberal impulses of the Supreme Court of Canada than with any inherent weakness in the law.[67] Only with the decision of that Court in *Whitter* and *Galjot* were conditions attached to the operation of section 195.1 which clearly limited its effect.

The figures for 1982 require explanation. The dramatic decline which took place that year is not attributable to the lack of activity by the police against street prostitution. In fact, they were more active than they had been since 1977 and their efforts were more successful. This spate of activity was not due to any change of heart over the value of the *Code* provision. It is explained by the fact that during 1982 a number of major cities were utilizing anti-street prostitution by-laws which focused on loitering or the offer to sell or purchase sexual services rather than on soliciting. This proved to be a far more effective way of securing convictions than was section 195.1.[68] As a consequence, the latter provision was largely ignored. Despite the reversal by the Supreme Court of Canada in 1983 in *R.* v. *Westendorp*[69] of this attempt by municipalities to proscribe or control street prostitution, there is little evidence that the use of section 195.1 is being revived.

There is no doubt that in the cities affected by street prostitution, the view of the police is that they are powerless to control it by formal legal mechanisms, especially by the invocation of the *Criminal Code*. The police view put simply is that the Supreme Court through *Hutt*, Whitter and *Galjot* has made it impossible to use the *Code* effectively to stem or at least control street prostitution, and consequently, has created the conditions in which it has been able to thrive and expand. In the minds of the police, unless a street prostitute puts "a half nelson" on, or unmercifully pesters an individual citizen, there is little or no chance of a successful prosecution. The frustration of the police with the courts is evident in the anecdote related to the Québec researchers:

> A plainclothes police officer was seated in a club featuring female dancers. He was playing the role of the rich customer, displaying a large wad of bills. A dancer approached him and asked if she could "dance" for him, specifying that there were four different types of "dance" she could do. At his request she explained that for ten dollars she would dance on his chair, for twenty she would allow him to fondle her while she danced on his knees, for forty dollars she would perform fellatio under the tablecloth, and for fifty she would agree to sexual relations in the washroom. The police officer replied that he would think about her proposals. During the next few minutes the dancer approached him twice more, encouraging him to decide quickly. The judge who heard the case found that there was no harassment and that, consequently, no solicitation had taken place according to Section 195.1.[70]

The perceived evidential difficulties of the police are summed up most pungently in an observation by a police officer to the Prairie researcher on prostitution:

> The evidence needed for prostitution right now is staggering. You need a persistent female that directly says she wants to sell herself. You need to see the money transaction. You just about need to see the sexual act. What are you going to do - pull out your badge half way through the act?[71]

The view of the police authorities of the adverse effects of prostitution activity on the urban environment and its impact on the community is seen in the brief to the Committee from the Calgary Police Commission:

> Since [Hutt], Calgary like many Canadian cities has experienced an inability to deal effectively with the ever growing numbers of street prostitutes or to control their visibility or blatant and intense activities. One only has to drive one's vehicle along 3rd or 4th Avenues in the City of Calgary between 1st and 5th Streets West during any afternoon or evening to appreciate the extent of the problem. This growing street activity by prostitutes has resulted and continues to result in interference with the normal business activities in these areas as well as with pedestrians and has resulted in an increase in violence among pimps and prostitutes. It has created and continues to create a danger to the public particularly young women who have the misfortune to find themselves in these areas when there is a heavy concentration of prostitutes.[72]

The police have felt particularly frustrated with their apparent inability to use the law effectively in communities such as Vancouver and Halifax where street prostitution is conducted in residential areas. In these cities, in addition to the complaints of business people, they have also been faced with a growing chorus of outrage from both individuals and groups with members who live in the affected areas.[73] The communities are distressed at the actual and perceived danger and annoyance caused to them by the activities of prostitutes, customers, pimps and general onlookers, and damage to their property. The police response is typically that they have been left powerless by the courts to invoke the criminal law to deal directly with the problems, and that, apart from employing their slender resources to investigate other crime which may be associated with prostitution, and using informal policing methods to control the situation perfunctorily, there is nothing they can do to resolve the situation on a long term basis.

In some instances the frustration with the law has an international dimension to it. In Niagara Falls, Ontario, because it abuts Niagara Falls, New York and is so close to the City of Buffalo, the police and the community at large view the increase in the incidence of street soliciting as stemming directly from the comparatively benign state of Canadian law and the difficulties with its enforcement. This, together with tougher laws on prostitution in the state of New York and more resolute enforcement in the City of Buffalo, has caused an influx of prostitutes and their managers with which the Canadian city is unable to cope.[74]

While there may well have been a gap between the perceived ineffectiveness of the law in section 195.1 and its actual potential, even after 1978, it is now clear that the section is of minimal value in addressing the problems associated with street prostitution. The combination of restrictive judicial interpretation of and police restraint in appealing to it have produced a hiatus which has had the effect of implanting in the minds of the public the view that the section is entirely inadequate, even if it has not been proved to be entirely ineffective in reality. With judges who appear to be reticent about convicting under it, law enforcement authorities who are unwilling to use it, and a public who have been persuaded that it is useless, it is difficult to see how it can be infused with new life in its present form.

A further criticism of section 195.1 is that the provision itself does not make it apparent whether the customer as well as the prostitute can be charged and convicted. As was pointed out in an earlier section, there is conflicting appellate authority from Ontario and British Columbia on this issue.[75] Representatives of women's and civil liberties groups, in particular, in their presentations before the Committee, pointed to the unsatisfactory state of the law with this element of uncertainty in it. Moreover, they pointed out that, insofar as one jurisdiction has rejected the notion that the customer can be charged under section 195.1, Canadian law maintains a long standing and insidious double standard which treats the prostitute alone as the criminal. There is, they believe, no justification for such discrimination.

In principle, the criticism is accurate. Moreover, at a pragmatic level, until the matter is resolved in accordance with the notion of equal treatment, it is possible that the section will be challenged successfully under the *Charter*. Because the *Code* provision itself is vague, a challenge might be sustained under section 7 of the *Charter* which affords the right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice.[76] Furthermore, although American jurisprudence is not particularly encouraging in this regard, a prostitute might succeed in challenging the provision under section 15 of the *Charter* which recognizes the equality of every individual before and under the law, and grants equal protection and benefit of the law without discrimination.[77] Given the relatively benign attitude of Canadian appellate courts towards prostitutes in prosecutions under section 195.1, it is not entirely fanciful to suggest that such an argument would strike a responsive chord with some judges.

Footnotes

[1] C. Backhouse, "Canadian Prostitution Law 1839 to 1972" in Canadian Advisory Council on the Status of Women, *Prostitution in Canada* (1984), at 7-8.

[2] *Ibid.*, at 8-9. For the British situation see J. Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge University Press, 1980).

[3] *Ibid.*, at 11-12. *The Canadian Criminal Code*, 55 & 56 Vict. (1892), c. 29 (Canada) contained provisions on procuring (see s. 185). The 'living on the avails' provision was added in 1913 (3 & 4 Geo v (1913), c. 13, s. 9 (Canada)).

[4] Backhouse, "Canadian Prostitution Law 1839 to 1972" at 15-6.

[5] *The Criminal Code Amendment Act* 1972, S.C., c.13, ss.12, 15.

[6] *The Criminal Code Amendment Act* 1980-2, S.C., c.125, s.13.

[7] See *The Criminal Code*, s. 179(1) for definition of "prostitution".

[8] See *R.* v. *Pierce* (1982), 66 C.C.C. (2d) 388 (Ont.C.A.). On the Canadian law on bawdy houses in general see J. Russell, "The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law", (1982) 14 *Ottawa L. Rev.* 270.

[9] *R.* v. *Cohen* (1939), 71 C.C.C. 142 (S.C.C.); *R.* v. *Worthington* (1972), 2 C.R.N.S. 34 (Ont. C.A.).

[10] *R.* v. *McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.); but see *R.* v. *Broccolo* (1976), 30 C.C.C. (2d) 540 (N.B.Prov.Ct.).

[11] *R.* v. *Patterson* (1968), 3 C.R.N.S. 23 (S.C.C.); *R.* v. *King* (1965) 2 C.C.C. 324 (Ont.C.A.); *R.* v. *Evans* (1973), 22 C.R.N.S. 32 (Ont.C.A.).

[12] *R.* v. *Lantay* (1965), 3 C.C.C. 170 (Ont.Prov.Ct.), relying on *R.* v. *De Munck*, [1918] 1 K.B. 635. A much broader definition which would catch all sexual relations between unmarried men and women, was used in the two earlier decisions: *Dubé* v. *R.* (1948), 94 C.C.C. 164 (Que.C.A.) and *R.* v. *Turkiewich* (1962), 38 C.R. 220 (Man.C.A.). It seems unlikely, however, that this broader definition would garner much support today. In this regard, it is to be noted that the *Lantay* definition has been used in interpreting "prostitution" in section 179 of the *Criminal Code*.

[13] *R.* v. *Lantay* (1965).

[14] *R.* v. *Mason* (1981), 59 C.C.C. (2d) (Ont.Prov.Ct.). See *R.* v. *Stewart* (1965), 47 C.R. 75 (Alta.Prov.Ct.); masseuses masturbating male customers in massage parlours.

[15] See *R.* v. *Pisces Health Spa* (1981), 63 C.C.C. (2d) (Alta. S.C., App.D). See also the unreported cases discussed in Russell, "The Offence of Keeping a Common Bawdy-House in Canadian Criminal Law" at 298-304.

[16] *R.* v. *Laliberté* (1973), 12 C.C.C. (2d) 109 (Que.C.A.).

[17] *R.* v. *Roberts* (1921), 36 C.C.C. 381 (Alta.S.C., App.D.); *Dubé* v. *R.* (1948); *R.* v. *Blais* (1946), 1 C.R. 190 (Ont.C.A.); *R.* v. *Leroy* (1951), 14 C.R. 299 (Que.C.A.); *R.* v. *Sorko* (1969), 4 C.C.C. 241 (B.C.C.A); See also *Theirlynck* v. *R.* (1931), 56 C.C.C. 156 (S.C.C.).

[18] *R.* v. *McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.); *R.* v. *Evans* (1973), 22 C.R.N.S. (Ont.C.A.); See also *R.* v. *Kerim* [1963] S.C.R. 124.

[19] *R.* v. *Baskind* (1975), 23 C.C.C. (2d) 368 (Que.C.A.); *R.* v. *Durand* (1951), 12 C.R. 293 (Que.C.A.).

[20] *R.* v. *Broccolo* (1976).

[21] *R.* v. *Knowles* (1913), 21 C.C.C. 321 (Alta.S.C.).

[22] *R.* v. *Wong* (1977), 33 C.C.C. (2d) 6 (Alta.S.C., App.D.).

[23] *R.* v. *Jacobs* (1941), 75 C.C.C. 337 (B.C.C.A.).

[24] *R.* v. *Jung Lee* (1913), 22 C.C.C. 63 (Ont.H.C.); *R.* v. *McEwan* (1932) 59 C.C.C. 75 (Alta.S.C., App.D.); but see *R.* v. *Theirlynck* (1931).

[25] *R.* v. *Hellenic Colonization Assoc.* (1943), 80 C.C.C. 22 (Alta.S.C., App.D.); *R.* v. *Mack* (1960), 128 C.C.C. 285 (B.C.C.A).

[26] N. Crook, *Prostitution in the Atlantic Provinces* WPPP#12 at 95.

[27] J. Fleischman, *Prostitution in Ontario:* An Overview WPPP#10 at 64-5.

[28] R. Gemme, A. Murphy, M. Bourque, N. Nemeh, N. Payment, *Prostitution in Québec* WPPP#11 at 45-6.

[29] Lautt, *Prostitution in the Prairies* WPPP#9 at 16.

[30] R. Gemme et al, *Prostitution in Québec* WPPP#1 at 49.

[31] See *R.* v. *Oakes* (1983), 2 C.C.C. (3d) 339 (Ont.C.A.).

[32] *R.* v. *Quinn* (1918), 30 C.C.C. 372 (Ont.C.A.).

[33] *R.* v. *Quinn* (1918); *R.* v. *Simpson* (1959), 30 C.R. 367 (B.C.Co.Ct.).

[34] *R.* v. *Turner* (1972), 8 C.C.C. (2d) 76 (B.C.C.A.); *R.* v. *Robinson* (1948), 6 C.R. 343 (Ont.C.A.); *R.* v. *Deutsch* (1983), 5 C.C.C. (3d) 41 (Ont. C.A.).

[35] *R.* v. *Gruba* (1969), 2 C.C.C. 365 (B.C.C.A.); *R.* v *Deutsch* (1983), at 34.

[36] *R.* v. *Wing* (1913), 22 C.C.C. 426 (Ont.C.A.).

[37] *R.* v. *Cline* (1982), 65 C.C.C. (2d) 214 (Alta.S.C., App.Div.).

[38] See Crook, *Prostitution in the Atlantic Provinces* WPPP#12, Appendix 2.

[39] *R.* v. *Celebrity Enterprises Ltd.*, [1978] 2 W.W.R. 562 (B.C.C.A.).

[40] *Ibid.*, at 580.

[41] *R.* v. *Nyshimura*, [1920] 2 W.W.R. 994 (Sask.C.A.); *R.* v. *Cavanaugh* (1941), 77 C.C.C. 79 (B.C.C.A.).

[42] *R.* v. *Fisette* (1960), 32 C.R. 281 (Qué.C.A.).

[43] *R.* v. *Nobulsi* (1965), 48 C.R. 344 (Qué. C.A.); *R.* v. *Novasad* (1939), 72 C.C.C. 21 (Sask.C.A.).

[44] *R.* v. *Johnson* (1940), 74 C.C.C. 324 (B.C.C.A.); *R.* v. *Vitale* (1969), 7 C.R.N.S. 78 (Ont.C.A.).

[45] *R.* v. *Sheeley* (1972), 26 C.R.N.S. 309 (Ont.Co.Ct.); *R.* v. *Nobulsi* (1965), 48 C.R. 344 (Qué.C.A.) The contrary view is expressed in *R.* v. *Fisette* (1960) at 42.

[46] *R.* v. *Johnson* (1940).

[47] There is some authority to the effect that the evidence of a prostitute on a living on the avails charge is the evidence of an accomplice and therefore requires a corroboration warning - see *R.* v. *Fleming* (1960), 129 C.C.C. 432 (Ont.C.A.). However, this view was rejected in *R.* v. *Clemens* (1980), 52 C.C.C. (2d) 259 (B.C.C.A) and its correctness may be doubted.

[48] Lautt, *Prostitution in the Prairies* WPPP#9 at 13.

[49] Fleischman, *Prostitution in Ontario* WPPP#10 at 43.

[50] Lowman, *The Vancouver Field Study on Prostitution* WPPP#4 at 46-7.

[51] Gemme et al, *Prostitution in Québec* WPPP#8 at 10.

[52] The change in the law followed in the wake of specific criticism of the vagrancy provision in *The Report of the Royal Commission on the Status of Women in Canada, (1970). See also Parl. Deb. H.C. Vol. II, 1970, at 1699-1700, 1704-5, 1708, 1721, 1724, 1775.*

[53] *R.* v. *Hutt*, [1978] 2 S.C.R. 476.

[54] *Ibid.*, 484.

[55] *R.* v. *Whitter*; R. v. *Galjot*, [1981] 2 S.C.R. 606.

[56] *R.* v. *Hutt* (1978).

[57] See *R.* v. *Figluizzi* (1981), 59 C.C.C. (2d) 144 (Alta. Q.B.); *R.* v. *Wise* (1982), 67 C.C.C. (2d) 231 (B.C.Co.Ct.); *R.* v. *McEwen*, [1980] 4 W.W.R. 85 (Sask. Prov. Ct.).

[58] *R.* v. *Dudak* (1978), 41 C.C.C. (2d) 31 (B.C.C.A.).

[59] *R.* v. *Di Paola* (1978), 4 C.R. (3d) 121 (Ont.C.A.).

[60] *The Criminal Law Amendment Act*, S.C., 1980-2, c.125, s.11.

[61] Lowman, *Vancouver Field Study on Prostitution* WPPP#8 at 2-3.

[62] *R.* v. *Hutt* (1978).

[63] It should be pointed out that the Québec figures were undoubtedly affected from 1980 by the introduction of By-Law 5464 by the City of Montréal in May, 1980. This by-law proscribed loitering, soliciting and offering to purchase social services. See Gemme et al, *Prostitution in Québec* WPPP#4 at 36.

[64] *Supra*, note 55.

[65] See House of Commons, Minutes of Proceedings and Evidence of Standing Committee on Justice and Legal Affairs, Issue No. 96, June 10, 1982, 5-12 (material submitted to Special Committee on Pornography and Prostitution).

[66] Lowman, *Vancouver Field Study on Prostitution* WPPP#8, II, fig. 51.

[67] The point here is not that the law after *Hutt* was satisfactory. It was not, in the sense that the Supreme Court had failed to suggest what might now constitute the "soliciting" in the context of the gloss made by it to section 195.1. What is apparent is that some police forces decided that no further assistance could be expected from the courts and that rather than seek further clarification, a preferable strategy was to downplay section 195.1 and press for legislative changes. See D.L. Winterton, "The Dilemma of Our Prostitution Laws" (1980) 9 *Can. Police Chief* 5.

[68] See Gemme et al, *Prostitution in Québec* WPPP#11 at 67, 69. While there were no cases completed under section 195.7 of the *Criminal Code* in 1982, and no arrests in 1983 in the Montréal Urban Community, there were 401 completed cases under by-law 5464 in 1982 and 339 arrests under a series of by-laws aimed at street prostitution in 1983.

[69] *R.* v. *Westendorp* (1983), 2 C.C.C. (3d) 330, (S.C.C.).

[70] Gemme et al, *Prostitution in Québec* WPPP#11 at 48-9.

[71] Lautt, *Prostitution in the Prairies* WPPP#9 at 12.

[72] Calgary Police Commission, *Street Prostitution* (Brief to Special Committee on Pornography and Prostitution) January 1984, at 2-3.

[73] A number of well organized and articulate community groups to combat street prostitution have developed, including C.R.O.W.E. (Concerned Residents of the West End) in Vancouver, T.R.O.S.S. (Toronto Residents on Street Soliciting); and the Halifax Downtown Residents Association.

[74] Fleischman, *Prostitution in Ontario: An Overview* WPPP#10 at 70-2.

[75] *R.* v. *Dudak* (1978) and *R.* v. *Di Paola* (1978).

[76] Neither Canadian nor United States authority has evinced any great enthusiasm for striking down criminal law provisions as opposed to municipal by-laws, see Part II, Chap. 4.

[77] See Chap. 32.

Chapter 30

General Criminal Law Provisions and their Impact on Prostitution

1. Introduction

As has already been mentioned, it is possible that other provisions in the *Criminal Code* which deal with broader forms of criminal conduct and include the criminal contexts or side effects of prostitution, may be used as the basis for prosecuting prostitution-related conduct. Indeed, it was suggested to the Committee by a number of women's groups that these more general provisions should provide a satisfactory basis for prosecution, without the need to resort to special offences related to prostitution. This suggestion was related, in particular, to advocacy of the repeal of section 195.1 of the *Criminal Code* (street soliciting).

2. The More General Offences

2.1 Gross Indecency

> 157. Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.
>
> 158. (1) Sections 155 and 157 do not apply to any act committed in private between
>
> (a) a husband and his wife, or
>
> (b) any two persons, each of whom is twenty-one years or more of age,
>
> both of whom consent to the commission of the act.
>
> (2) For the purposes of subsection (1),
>
> (a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and
>
> (b) a person shall be deemed not to consent to the commission of an act

> (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations as to the nature and quality of the act, or
>
> (viii) if that person is, and the other party to the commission of the act knows or has good reason to believe that that person is feeble-minded, insane, or an idiot or an imbecile.

> 138. In this Part
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied;

There are apparently no reported cases in which section 157 has been utilized against either a prostitute or customer relating to the sexual conduct in which they have been engaged.[1] However, the Committee has been informed by representatives of police forces in Winnipeg, Calgary, Ottawa and Toronto that section 157 either has been or is being successfully invoked in some cases in which prostitution is involved. This is so with street prostitution, where the sexual acts will often have been committed in public, for example, in a public park or parking lot. However, its use is attended with some difficulty. Despite the public location it is still necessary for the Crown to prove that an act of gross indecency took place. This has been interpreted by the Ontario Court of Appeal to mean "a very marked departure from the decent conduct expected by the average Canadian in the circumstances that....existed".[2] Accordingly, only if prostitutes and their customers choose to conduct their sexual liaisons in an open and brazen way in public are they subject to successful prosecution under this head.

A second problem may lie with the characterization of this offence as indictable with a prison term of up to five years. The Winnipeg Police Force informed the Committee that in their experience, some judges had proved reticent about convicting under this section, with the result that the policy adopted in that city has been to lay the lesser charge of "indecent act" under section 169.

3. The Public Nuisance Offences

3.1 Indecent Acts

> 169. Every one who wilfully does an indecent act
>
> (a) in a public place in the presence of one or more persons, or
>
> (b) in any place, with intent thereby to insult or offend any person,
>
> is guilty of an offence punishable on summary conviction.

Whether or not a prostitute and customer can be successfully prosecuted under this section for sexual conduct in public or a prostitute for advertising services in a public place, depends on whether the act is classified as "indecent". The case law suggests that a community standard test is taking hold and is being applied in such a way that the conduct in question has to be particularly offensive, for example, a couple making a sexual spectacle of themselves.[3]

Assuming, as several lower courts have done, that the definition of a "public place" in section 138 covers a motor vehicle in a public place, offensive sexual activity in a car would be covered.[4] However, it is a further requirement that the offending conduct occur in the presence of one or more third parties. Accordingly, if the pair follow the usual practice of finding a secluded spot to carry through the terms of their agreement, it is unlikely that they could be prosecuted successfully, unless their judgment about their privacy proves to be wrong.[5]

Given these problems, it is unlikely that this section will avail the Crown in cases of prostitution, except where prostitute, customer or both act recklessly.

Information which the Committee has gleaned from police forces in major Canadian cities underlines the difficulties mentioned above. With the exception of the Toronto and Winnipeg Police Forces, both of which seem to have had some success with prosecutions under this section, most forces do not invoke it in street prostitution cases. The Vancouver police pointed to the difficulty in its use created by case law which had determined that the requirement of exposure to another person or persons in s. 169(2) is not satisfied by exposure to a police officer.[6]

3.2 Nudity

> 170. (1) Every one who, without lawful excuse,
>
> (a) is nude in a public place, or
>
> (b) is nude and exposed to public view while on private property, whether or not the property is his own,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) For the purposes of this section a person is nude who is so clad as to offend against public decency or order.
>
> (3) No proceedings shall be commenced under this section, without the consent of the Attorney General.

Although both subsection (2) and the case law suggest that complete nudity is not required by this section, it is clear that an advanced state of undress or exposure of the body is necessary.[7] Unless the conduct of the accused prostitute or customer is particularly blatant and potentially subversive of public order, the use of the section is academic in the case of street prostitution.

3.3 Causing a Disturbance

> 171. (1) Everyone who
>
> (a) not being in a dwelling-house causes a disturbance in or near a public place,
>
> (i) by fighting, screaming, shouting, swearing, signing or using insulting or obscene language,

> (ii) by being drunk, or
> (iii) by impeding or molesting other persons...
> is guilty of an offence punishable on summary conviction.

"Causing a disturbance" is one of four offences set out in section 171. Clearly the terms of section 171(1)(a)(i) could cover situations involving conflict between prostitutes and their customers, between prostitutes and pimps and between prostitutes themselves which adversely affect members of the public, including police officers.

Despite earlier reticence on the part of the courts, they now seem willing to accept evidence of emotional disturbance to an individual caused by the objectional forms of conduct mentioned as disturbance.[8] The Committee heard from the Calgary Police Force that this clause has been successfully invoked in such circumstances. Less clear is whether section 171(1)(a)(iii) which might be thought to provide a way of attacking the more aggressive forms of soliciting, is viable as a means of curbing street prostitution. Both police and Crown prosecutors report that the attitude of provincial court judges seems to be that this provision is not available to circumvent the restriction imported by *R.* v. *Hutt* into section 195.1.[9] In short, they tend to use a "pressing or persistent" gloss in construing the words "impeding or molesting".

3.4 Loitering and Obstructing

> 171. (1) Every one who
> (c) loiters in a public place and in any way obstructs persons who are there...
> is guilty of an offence punishable on summary conviction.

Unlike section 171(1)(a)(iii) there is no requirement in section 171(1)(c) to establish that the accused's conduct amounted to a disturbance. The ostensible attractions in this clause as a means of curbing street soliciting have not been realized. Although the Toronto police report some success in using this clause prior to 1983, the experience of other Forces has been uniformly bad when they have tried to invoke it. The Ontario Court of Appeal in *R.* v. *Munroe*[10] recently made it clear that the provision has a very limited application. The court, mindful of the demise of the old "Vag. C." offence of loitering, determined that loitering in this context means loitering without a purpose. As prostitutes and their customers can be said to have a purpose, they do not fall within the terms of the proscription. Obviously the courts are also unwilling to use this provision to compensate for the restrictive interpretation given by the Supreme Court to section 195.1.

3.5 Disturbing the Peace

> 171. (1) Every one who
> (d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in

> a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling houses comprised in the building or structure have access as of right or by invitation, express or implied,
>
> is guilty of an offence punishable on summary conviction.

Section 171(1)(d) creates the offence of disturbing the peace and quiet of the occupants of dwelling houses by disorderly conduct in a public place or in a common area of a residential building. On the surface this might be thought to provide potential solace to the residents of areas adversely affected by street prostitution. To date there are no reported cases, and the police in the cities adversely affected by prostitution in residential areas doubt its efficacy in street prostitution cases. The problem is that there is uncertainty as to what amounts to "disorderly conduct" in the context of this provision. It seems unlikely that random instances of disturbance would be caught.[11] Accordingly, it is safe to assume that a pattern of disturbing the peace and quiet of local residents would be required before a prosecution would succeed.

3.6 Trespassing at Night

> 173. Every one who, without lawful excuse, the proof of which lies upon him, loiters or prowls at night upon the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction.

This section is likely to be of use only in the case of a prostitute or customer "loitering" on premises close to a public place. In that event the Crown has to establish that the conduct of the accused amounted to "hanging around".[12] The police in several major cities suggest that the provision has the "peeping tom" in contemplation rather than the prostitute or customer.

3.7 Common Nuisance

> 176.(1) Every one who commits a common nuisance and thereby
>
> (a) endangers the lives, safety or health of the public, or
>
> (b) causes physical injury to any person,
>
> is guilty of an indictable offence and is liable to imprisonment for two years.
>
> (2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby
>
> (a) endangers the lives, safety, health, property or comfort of the public, or
>
> (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

Strangely enough in the *Code* section on common nuisance, the definition of the offence punishable under the *Code* (section 176(1)) and the definition of "common nuisance" as a term of legal art (section 176(2)), diverge. A *Code* prosecution is possible only if the Crown can prove danger to the lives, safety or health of the public, or actual physical injury. So framed, there are few, if any, street prostitution situations which would qualify. The definition of "common nuisance", however, extends to danger to the property or comfort of the public, as well as their obstruction, and thus formulated could well be employed in street soliciting cases.

The dichotomy in the section is explained by the fact that, while the *Code* establishes the offence as having a narrow ambit for purposes of punishment under its regime, it recognizes that for other purposes the notion of "common nuisance" may have a broader meaning.[13]

The implications of this for street soliciting may be seen in *Attorney General of British Columbia* v. *Couillard*.[14] In that case the Attorney General of British Columbia sought an interim injunction against certain named alleged prostitutes to enjoin them from operating in Vancouver's West End. The basis for the action was that their activities and those of others like them constituted a public nuisance. Chief Justice McEachern of the province's Supreme Court granted the injunction. He was satisfied on the basis of evidence produced before him that the defendants were prostitutes active in the area in question.

Concern has been voiced about whether merely being a prostitute in a public place should be characterized as a nuisance, which is the effect of this judgment. Moreover, it is questionable that the judge was correct in hinting as he did, that this was a case in which the Attorney General was entitled to invoke his power to call the civil process into play in support of the criminal law. It was nowhere established that a *Criminal Code* offence which required restraining was committed or threatened. However, the Chief Justice was undoubtedly correct in suggesting that there is a species of public offence, common nuisance, which is remediable in appropriate cases by the civil remedy of the injunction.

The upshot of this decision is that what is essentially a civil action for a civil remedy may be brought against street prostitutes, and presumably their customers, invoking the broader definition of common or public nuisance accepted by the common law of crimes. In short, what the *Code* cannot achieve directly may be achieved indirectly by this route. What remains uncertain as a result of this decision is how far the Attorney General has to go in establishing his case against the individual defendants.

4. Communicating Venereal Disease

> **253. (1) Every one who, having venereal disease in a communicable form, communicates it to another person is guilty of an offence punishable on summary conviction.**

> (2) No person shall be convicted of an offence under this section where he proves that he had reasonable grounds to believe and did believe that he did not have venereal disease in a communicable form at the time the offence is alleged to have been communicated.
>
> (3) No person shall be convicted of an offence under this section upon the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.
>
> (4) For the purposes of this section "venereal disease" means syphilis, gonorrhea or soft chancre.

This provision of the *Code* is so encumbered with limitations that even if, as is unlikely, the victim of the disease who contracts it in the course of prostitution-related activities complains of it, and has one of the limited list of maladies mentioned, it is unlikely to provide a viable basis for prosecution in prostitution cases. In particular, given the clandestine character of most relationships between prostitutes and customers, the corroboration requirement seems insurmountable. Section 58 of Bill C-19 introduced by Minister of Justice MacGuigan in 1984 sought to repeal section 253 of the *Code* on the grounds that disease of this sort are a public health matter, and that no use is made of the section in practice.

5. Intimidation

> 381. (1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing,
>
> (a) uses violence or threats of violence to that person or his spouse or children, or injures his property,
>
> (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted upon him or a relative of his, or that the property of any of them will be damaged,
>
> (c) persistently follows that person about from place to place,
>
> (d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
>
> (e) with one or more other persons follows that person, in a disorderly manner, on a highway,
>
> (f) besets or watches the dwelling-house or place where that person resides, works, carries on business or happens to be, or
>
> (g) blocks or obstructs a highway,
>
> is guilty of an offence punishable on summary conviction.
>
> (2) A person who attends at or near or approaches a dwelling-house or place, for the purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section.

Although there are, in theory, situations involving street prostitution which would fit within the ambit of this section of the *Code*, it is likely that the courts, in tune with their cautious attitude to other more general offences, would convict only in the clearest cases of harassment. None of the major city police forces consulted by the Committee utilize this section in prostitution cases. Although at least one provincial Court of Appeal has said that this section is not confined in its application to industrial disputes and trade union activity, law enforcement authorities seem to work on the assumption that it is.[15]

6. Taxation Legislation

The application of taxation legislation and the operations of Revenue Canada in relation to prostitution activities is shrouded in a certain amount of mystery.

Prostitution, in common with any other economic activity, is subject to taxation. The problem from the point of view of the prostitutes and the operator of a prostitution business is that there are certain dangers inherent in declaring income for tax purposes, not the least of which is that the police will secure the information and use it as a basis for a charge of living on the avails. The effect of these risks is probably to induce most individuals engaged in prostitution activities not to file. However, the latter decision may well result in criminal charges under the *Income Tax Act*, if it is discovered that the individual has been working and not declaring the resulting income. Research done on prostitution in the Maritimes makes it clear that a number of madams operating escort and dating services have been caught in this bind. In at least one such case, the delinquency of the operator in not declaring prostitution income was used as a bargaining point by the prosecution authorities, who agreed to drop *Criminal Code* charges if the madam undertook to pay back taxes.[16]

In one noteworthy case, *Minister of National Revenue* v. *Eldridge*,[17] a prostitute (a call girl) who had filed tax returns, appealed the Department's assessment of her net income on the ground that it failed to take adequate account of business expenses. She also appealed a penalty for tax evasion. The judge, while accepting a variety of business expenses associated with her trade, including rental expenses, telephone inspection, protection fees to the police, liquor payment fees, payment of bail bonds for arrested 'girls' and payments to casual employees for which vouchers were submitted, rejected argument that she could claim deductions for expenses where she had suppressed or destroyed the records. In his mind, this was a voluntary act on her part. The case was remitted to the Minister for reassessment in accordance with the judge's findings, and the penalty was confirmed.

The decision illustrates the dilemma faced by prostitutes, who in some instances are quite ready to accept their civic obligations. Although the situation is not clear, the Committee has the impression that taxation legislation and the sanctions which attend non-compliance are normally invoked only where the delinquent tax payer is notoriously involved in a prostitution business. For the rest, especially the street prostitutes, it is presumably not worth the time and effort of taxation authorities to investigate and lay charges.

7. The Utility of these Provisions

An analysis of these more general *Code* provisions and their application demonstrates that they are of limited value in combatting prostitution, especially street prostitution. In a number of instances, the provisions are so limited, for example, sections 173, 176 and 253, that their use is entirely academic. In other cases, the interpretation given to the provisions by the courts either limits their substantive ambit directly, for example, section 381, or requires such an aggravated degree of conduct, for example, sections 169 and 171(1)(c), that the same result is achieved indirectly. It is clear that the courts, especially at the provincial court level, are resistant to the idea that these provisions should be used to compensate for the limitations in section 195.1. Crown prosecutors and police sense this and tend not to proceed. Even in communities where more vigorous attempts have been made to invoke some of these provisions, rebuffs by the courts have blunted the enthusiasm of law enforcement authorities for using them.

It should be pointed out that even if the provisions were more viable, there is some doubt as to whether they would be widely used. Both the studies commissioned by the Department of Justice and submissions from police forces indicate that the police feel considerably aggrieved that in dealing with street prostitution, they are reduced to making their way through a maze of *Code* provisions to find a section which might avail them. The view of the police seems to be that if they are expected to deal resolutely with street prostitution, they require the tools to counter it effectively. For them, that means stiff and precise sections relating specifically to street soliciting. As Superintendent McNeney of the Investigation Division of the Vancouver Police stated in a letter to the Committee on behalf of Chief Stewart:

> In general, the socially harmful conduct referred to [i.e. that flowing from prostitution] is an effect of prostitution on our streets. The prostitutes and their customers are the cause. It is impossible to effectively deal with harmful conduct, without enforceable statutes governing the open soliciting by prostitutes. The nine *Criminal Code* provisions listed above [i.e. dealt with in this section] have very simply proven not to be the answer.

8. Other Forms of Criminal Conduct Associated with Prostitution

Evidence from police forces in the major Canadian cities indicates that other forms of crime are associated with prostitution. In their brief to the Committee, the Calgary Police Commission provided statistics on the level of street prostitution-related crime in that city between June 17, 1981 and December 9, 1983. During that period there were 115 such crimes.[16] These included:

Theft over $200.00 - 24(20.9%)
Assault - 14(12.2%)
Wounding - 11(9.6%)
Robbery with Violence - 7(6.0%)
Indecent Assault - 7(6.0%)
Assault occasioning Bodily Harm - 6(5.2%)
Rape - 5(4.3%)

Living on the avails and procuring counted for 12(10.4%)and 4(3.5%) respectively. "Others" amounted to 25(21.7%). The contexts of the reported crimes varied, but typically involved offences by prostitute on customer or vice-versa, by prostitute against bystander, pimp against prostitute, or prostitute against prostitute.

It has been suggested to the Committee by some women's groups that if street soliciting were to be decriminalized, the focus of the law would then become what it appropriately should be, namely the prosecution of conduct which is palpably criminal. Law enforcement authorities counter this argument by asserting that if the public manifestations of prostitution are not effectively controlled by the criminal law, other forms of criminal conduct associated with it can be expected to proliferate. In short, they argue that, prostitution, especially street prostitution, is a notorious cause of or contributor to other forms of crime and that any figures related to prostitution will represent but a small proportion of the criminal activity which actually takes place.

These claims and counterclaims are difficult to deal with, because there is in Canada an absence of serious research which can demonstrate clearly that prostitution, especially street prostitution, is a significant cause of or patently attracts more general criminal activity. It would appear that some crime is caused or attracted, and that it is generated by the activities of relatively few people. However, it is not clear whether an area in which street prostitution occurs is necessarily less law abiding than a similar area in which it does not exist. An American study in Boston concluded that the latter was not proven.[19]

It is clear that individual Canadian police officers have doubts about official claims linking prostitution to widespread criminality. The Prairie researcher on prostitution reports that

> [p]olice respondents are fully aware of the richness of the street culture, and several police made it clear that in their minds at least, all the other aspects of other illegal activities within that culture would occur whether prostitution were present or not. Only one policeman [of the 46 respondents] assumed that if street prostitution were stopped, that all illegal activities would be substantially decreased.[20]

In the view of the Committee the debate is, in the absence of more extensive data, likely to be inconclusive and, therefore, unhelpful. The important question is whether the public manifestations of prostitution generally produce the sort of harms and the degree of harm which the criminal law should specifically address.

A further issue is the relationship between the sort of violent and coercive conduct which is often involved in procuring and pimping, and other generic offences involving violence. Although there was substantial agreement among those who appeared before the Committee that both these forms of conduct warrant harsh sanction by the criminal law, particularly when associated with violence or its threat, the Committee has thought it important to consider that the offences of both procuring and pimping overlap with offences which deal with the actuality and threat of physical or psychological violence. As a consequence, a question arises as to whether special provisions are required to deal with prostitution-related conduct of this sort.

The offences in the *Code* which are often exemplified in the conduct of pimps and procurers are: (i) assault and sexual assault (sections 244-246); (ii) kidnapping (section 247); and (iii) extortion (section 305).

> 244. (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
>
> (b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
>
> (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> 245. Every one who commits an assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for five years; or
>
> (b) an offence punishable on summary conviction.
>
> 245.1 (1) Every one who, in committing an assault,
>
> (a) carries, uses or threatens to use a weapon or an imitation thereof, or
>
> (b) causes bodily harm to the complainant,
>
> is guilty of an indictable offence and is liable to imprisonment for ten years.
>
> (2) For the purposes of this section and sections 245.3 and 246.2, "bodily harm" means any hurt or injury to the complainant that interferes with his or her health or comfort and that is more than merely transient or trifling in nature.
>
> 245.2 (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.
>
> (2) Every one who commits an aggravated assault is guilty of an indictable offence and is liable to imprisonment for fourteen years.
>
> 245.3 Every one who unlawfully causes bodily harm to any person is guilty of an indictable offence and is liable to imprisonment for ten years.
>
> 246.1 (1) Every one who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for ten years; or

(b) an offence punishable on summary conviction.

246.2 Every one who, in committing a sexual assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof,

(b) threatens to cause bodily harm to a person other than the complainant,

(c) causes bodily harm to the complainant, or

(d) is a party to the offence with any other person,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

246.3 (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) Every one who commits an aggravated sexual assault is guilty of an indictable offence and is liable to imprisonment for life.

246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault, 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

247.1 (1) Every one who kidnaps a person with intent

(a) to cause him to be confined or imprisoned against his will,

(b) to cause him to be unlawfully sent or transported out of Canada against his will, or

(c) to hold him for ransom or to service against his will, is guilty of an indictable offence and is liable to imprisonment for life.

(2) Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offence and is liable to imprisonment for five years.

(3) In proceedings under this section the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or exhibition of force.

305. (1) Every one who, without reasonable justification or excuse and with intent to extort or gain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom the violence is shown, to do anything or cause anything to be done, is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(2) A threat to institute civil proceedings is not a threat for the purposes of this section.

It is quite possible to lay these charges for these offences against procurers and pimps, and in some instances they have been, either as independent counts or alternative charges to procuring or living on the avails. In the former instance, it may not have been possible for the Crown to adduce sufficient evidence to move for a conviction on one or other of the two special offences. In the latter instance, the more general offence may have been invoked as a fall back position (if living on the avails fails, the court might still convict on assault), or because of the aggravated circumstances attending the case (the victim was kidnapped and forced to engage in acts of prostitution, or was subjected to aggravated assault because she did not please her pimp), the accused should be convicted on more than one count and sentenced accordingly.

In the present *Code*, the special and the more general offences coexist because there are aspects of procuring and pimping which do not fall neatly within the purview of violence or its threat. Both procuring and pimping may be established without proving actual or anticipated force. The emphasis in both offences is certainly on an odious form of exploitation but that can be established without proving violence or threat of force on the part of the procurer or pimp. The second reason seems to be that procuring and living on the avails are relational offences, that is, they take place normally within the context of an ongoing exploitative relationship. The latter, if anything, is the primary objective of the law's concern, rather than the single incident which may have triggered the charge. The more general offences, by contrast, are geared to dealing with single instances without any obvious concern, except in relation to sentencing, with the presence of a pre-existing power relationship between the accused and the victim. A third and complementary reason for the coexistence of the various provisions is that in some instances, it allows the Crown to seek a more severe penalty. This could happen where the Crown has come upon the existence of a procuring or pimping relationship as the result of a complaint alleging less serious criminal conduct, for example, a simple assault.

As long as the law continues to attack procuring and pimping on the basis of a broad rationale of exploitation, however exerted, it is difficult to see how offences like assault, kidnapping or extortion can satisfactorily accommodate fully that type of conduct. Perhaps there would be less argument in favour of the special offences if they were confined to contexts in which force is applied or threatened. However, it may be argued that there will be situations in which it is important to preserve offences which stress the relational factor.

In particular, the other offences, especially kidnapping and extortion, may not fit the facts, and the penalty for assault may not fully reflect the exploitative nature of the conduct. It may be cold comfort to a prostitute who is constrained to remain in prostitution by constant threats of force against her that, unless the Crown can establish that she was kidnapped or the victim of extortion, the best she can hope for is that the procurer or pimp be found guilty of simple assault and imprisoned for up to five years. In other words, unless the more general provisions can be precisely framed to reflect the relational element, there is a rational argument for the retention of procuring and living on the avails as separate offences.

Footnotes

[1] There is a hint in *R.* v. *J.* (1957), 21 W.W.R. 248 (Alta.Prov.Ct.) that if the fellatio involved in that case (on a young male by his fiancée) had been provided by a stranger for money there would have been a conviction.

[2] *R.* v. *Quesnel* (1980), 51 C.C.C. (2d) 270 (Ont.C.A.).

[3] See *R.* v. *Hecker* (1980), 58 C.C.C. (2d) 66 (Yukon Terr.Ct.) (accused acquitted for briefly exposing buttocks in an attempt to be humorous).

[4] *R.* v. *Figluizzi* (1981), 59 C.C.C. (2d) 144 (Alta.Q.B.); *R.* v. *Wise* (1982), 67 C.C.C. (2d) 231 (B.C.Co.Ct.).

[5] In *R.* v. *Miteli* (1977), 36 C.C.C. (2d) 321 (Ont.Prov.Ct.Cr.D.) it was held that it is no defence to a charge under this section that the accused was unaware that he was being observed.

[6] *R.* v. *Hastings*, [1947] 4 D.L.R. 748 (N.B.S.C. App.D.).

[7] See *R.* v. *Verrette* (1978), 40 C.C.C. (2d) 273 (S.C.C.).

[8] See *R.* v. *Swinimer* (1978), 40 C.C.C. (2d) 432 (N.S.S.C., App.D.); *R.* v. *Berry* (1980), 56 C.C.C. (2d) 99 (Ont. C.A.); *Whitehouse* v. *Reimer (No. 2)* (1981), 61 C.C.C. (2d) 134 (Alta.Q.B.); *R.* v. *Peters* (1982), 65 C.C.C. (2d) 83 (B.C.C.A.).

[9] The Committee understands that this has been the case in Vancouver where it is believed by the police and prosecutors that provincial court judges would react unfavourably to any attempt to use section 171(1)(a)(iii) ("impeding or molesting") to get around *Hutt*.

[10] *R.* v. *Munroe* (1983), 5 C.C.C. (3d) 217 (Ont.C.A.). See also *R.* v. *Gauvin* (1984), 11 W.C.B. 441 (Ont. C.A.).

[11] An intrusive pattern of conduct would be required, such as continuing noise from a parked car, or shouting between prostitutes.

[12] *R.* v. *Andsten* (1960), 33 C.R. 213 (B.C.C.A.).

[13] See *Martin's Criminal Code*, 1955, (Toronto: Cartwright & Sons, 1955) at 282-96 for the history and rationale of this provision.

[14] *Attorney General of British Columbia* v. *Couillard* (1984), 14 C.C.C. (3d) 169 (B.C.S.C.). Compare *Attorney General of Nova Scotia* v. *Beaver*, Dec. 19, 1984 (unreported) N.S.S.C.Tr.Div. in which MacIntosh J. rejected an application for an interim injunction against street prostitutes in Halifax on the ground that this action represented an attempt to usurp the federal parliament's criminal law power by civil means. The judge seems to have accepted that the injunction was being sought to support the criminal law in this case.

[15] See *Re Regina and Basaraba* (1975), 24 C.C.C. (2d) 296 (Man. C.A.).

[16] Crook, *Prostitution in the Atlantic Provinces*, Working Papers on Pornography and Prostitution (W.P.P.P.) Report #12, Department of Justice, Ottawa, 1984 at 56.

[17] *Minister of National Revenue* v. *Eldridge*, [1964] C.T.C. 545 (Exch. Ct.).

[18] Calgary Police Commission, *Street Prostitution* (Brief to Special Committee on Pornography and Prostitution, January 1984), Appendix V.

[19] B. Milman, "New Rules for the Oldest Profession: Should we Change our Prostitution Laws?" (1980) 3 Harvard Womens L.J. at 1.

[20] M. Lautt, *Prostitution in the Prairies* W.P.P.P.#9, at 27.

Chapter 31

Control and Regulation of Prostitution by Provincial and Municipal Law

1. The Relative Powers to Limit Prostitution

As indicated in Part I, Section II, Chapter 3, the ability of the provinces and municipalities to develop legal strategies to deal with prostitution depends upon the division of powers between the federal parliament and the provincial legislatures within the Canadian Constitution.

The extent of the powers of the federal Parliament and the provincial legislatures to limit prostitution-related activity was untested until recently. However, in the wake of the perceived weaknesses of section 195.1 of the *Criminal Code*, several of the municipalities most affected by street prostitution passed by-laws to curb street soliciting. This movement on the part of municipalities was challenged and the courts had the opportunity to clarify the relative domains of federal and provincial jurisdiction.

The by-laws enacted in Calgary, Montréal, Vancouver and Niagara Falls were ostensibly grounded in the powers granted to those municipalities by special or general provincial legislation. They made it an offence either to loiter for the purposes of prostitution or to offer to sell or purchase sexual services in a public place. The by-laws provided for fines on conviction and for imprisonment in the case of default. Sentencing judges were also empowered to award costs against the convicted person.[1]

Statistics received by the Committee from these cities indicate that the by-laws were vigorously enforced by the local constabularies. The brief from the Calgary Police Commission, for example, reveals that 530 charges were laid under that city's by-law between June 25, 1981 and the end of 1982.[2] This compares with Statistics Canada's report of 75 charges under section 195 (for procuring, living on the avails and street soliciting) for the whole of Alberta in 1979, and 12 charges in 1980.

The Calgary by-law was challenged in *R.* v. *Westendorp*,[3] a case which ultimately reached the Supreme Court of Canada in 1983. The by-law made it an offence to be or remain on the street for the purpose of prostitution. "Prostitution" was defined as "the sale or offering for sale of sexual services and includes the purchase or offering to purchase of sexual services". The Supreme Court determined that the by-law was outside the powers assigned to the province as it amounted to an attempt to enact criminal law, thus invading federal legislative authority. The power to legislate criminal law, said the court, resides exclusively with the federal Parliament.

The demise of the Calgary by-law was sufficient to persuade the other municipalities with similar provisions that they should no longer attempt to enforce them. The decision in *Westendorp* clearly rules out attempts by municipalities to proscribe prostitution related activities. The municipalities have no power to make "criminal law" on prostitution. Moreover, given the exclusive nature of the federal Parliament's jurisdiction over prostitution-related activities as crimes, the bar to provincial or municipal legislation would exist, even in the absence of federal legislation.

2. The Power to Regulate Prostitution

There is nothing in the judgment of the Supreme Court in *Westendorp* which prevents a municipality from exercising the power given to it by provincial legislation to regulate or license business activities within its territory. It is, of course, essential that regulation or licensing is the genuine objective of the by-law. If it is proscription in the garb of regulation, then it is likely to be struck down as an attempt to enact criminal law.

Since *Westendorp*, three municipalities have introduced or are seriously considering by-laws which attempt to limit street prostitution by invoking the regulatory power to grant or withhold business licences. Montréal, in a by-law which involves a wide variety of street businesses or services, makes it an offence to engage in such activity on the street or on the exterior part of adjacent private property, unless authorized by by-law.[4] A Niagara Falls by-law enacted in 1984 is similar to that in Montreal, although it refers simply to the offer to sell or purchase "services" upon the street.[5] Vancouver has drafted and is considering a by-law which seeks to prohibit the conducting of specified businesses in public places. "Conduct of business" includes the act of negotiating the sale or purchase of a service or commodity. To date only one business is listed in the proposed schedule of prohibited business, to wit "sexual services".[6]

In principle, provisions of this type have a better chance of surviving challenge because it can be argued that they represent an attempt to control street business in general. If, however, they are seen to be in substance (as Vancouver's proposed by-law in its present form may be) directed solely towards the eradication of street prostitution, then a court may well determine that they represent a "backdoor" attempt to legislate criminal law.[7]

Apart altogether from possible constitutional complications, those who enforce the by-laws see pragmatic difficulties with their application. Police authorities in Montréal report that the street business by-law is assisting in controlling street prostitution in that community. However, the application of the by-law does not appear to be causing a reduction in the overall dimensions of the problem.

Chief André De Luca of the Montréal Police informed the Committee that during 1983, under both the original by-law (that relating specifically to street prostitution) and the new business control by-law, there were 339 charges relating to soliciting for the purpose of prostitution.[8] For the first 6 months of 1984 no less than 323 charges were laid under the new by-law. Chief De Luca sees this as evidence that the by-law is not serving to reduce the incidence of street prostitution in that city. He attributes that problem directly to the lack of power of arrest and detention under municipal by-laws in Montréal. There is thus no guarantee that those charged will appear in court. Moreover, the inclination of many who are charged is to immediately return to the streets. Where convictions are secured, the police doubt that the fines handed down have any significant deterrent value.

The power which municipalities typically possess to license businesses has also been used to attempt to regulate other forms of prostitution activity, for example, escort services and massage parlours. It is well established and was confirmed by the Supreme Court of Canada in *City of Prince George* v. *Payne*[9] that a municipality cannot use this licensing power to make it unlawful to carry out a legal business activity. However, this restrictive view may be tempered by the possibility of municipalities using their "zoning power" to prevent the location of such establishments and businesses within their jurisdiction. Such a move by Vancouver was upheld recently in *Red Hot Video* v. *City of Vancouver*.[10] Apart from a dubious dictum from the Divisional Court of Ontario[11], the case law does support the proposition that municipalities may regulate as opposed to banning such establishments and businesses through the enactment of by-laws.[12]

Escort services and massage parlours are typically required to secure business licences like any other commercial operations. Some municipalities have gone the further step of enacting special by-laws relating to these particular businesses. These are normally so drafted as to make it expensive to operate such an establishment, and at least try to limit the type and volume of sexual services provided.

An instructive example in the case of escort services is the City of Saskatoon's "Dating and Escort Service By-law".[13] The by-law establishes an annual licence fee of $2,000 for the business, and in addition requires that each "dater" or "escort" possess a licence, the annual rate for which is $500. The latter type of licence cannot be held by a person not in the employ of a licensed service, and the applicant for a licence must submit "a written recommendation signed by or on behalf of the Chief of Police". A list must be kept by the operator of the 'escorts' or 'dates', and their vital statistics. The list must be furnished on demand to any peace officer or to the Chief Licence Inspector. The operator of a service is required to maintain a record of each transaction, including the name, address and phone number of the client, the name of the escort, the time and date of her arrival, the type of service provided and her fee. The business is limited to the hours between 7:00 a.m. and 12:30 p.m. and advertisements involving sexual suggestion are prohibited. Infractions incur a fine ranging between $200 and $500.

The Saskatoon by-law was challenged in 1983 on the ground that it represented an attempt to enact "criminal law".[14] It survived that challenge, the judge determining that it was a valid exercise of the City's power to regulate local businesses. In a more recent decision of the Court of Queen's Bench in Manitoba, an escort services by-law was upheld notwithstanding that it imposed a higher fee for such establishments.[15] The court went on to say that it was proper for city council to act on moral grounds in enacting such legislation and that such a by-law was not in violation of section 7 of the *Charter*.

Massage parlour by-laws have also been enacted by some Canadian municipalities.[16] A provision which is common to most of these enactments is that which prohibits any licensee from permitting an attendant to administer a massage unless the attendant is wearing clean, washable, non-transparent outer garments covering the body from neck to knee.[17]

Whether or not this type of provision achieves its apparent purpose of discouraging sexual arousal and encounter, the by-laws themselves have proved resistant to constitutional challenge. The courts in these cases have been careful to distinguish criminality on the one hand and morality on the other. Their view is that provinces, and through them, municipalities, have a legitimate concern with morality and can legislate on it providing the legislation comes within one of the recognized areas of provincial jurisdiction. In these cases, the legislation was characterized as regulation of a local business and, therefore, within the "property" and "civil rights" class of subjects within section 92(13) of the *British North America Act*.[18]

The message from the courts is that with regulatory regimes designed in whole or in part to control prostitution, validity will depend upon whether the primary thrust of the enactment is regulation rather than proscription. Relevant to that question will be the generality of the regulation (Does it apply to a range of businesses or activities or exclusively to prostitution?), and, if it is specific, whether, on balance, its purpose seems to be to permit the activity within limits or to proscribe it.

Far less contentious constitutionally are the municipal by-laws which reflect the power granted to municipalities to control noise, littering, vehicular traffic, parking and obstruction of sidewalks and other public areas. In theory, these provide a means of controlling some of the problems associated with street soliciting. However, difficulties with obtaining adequate evidence, especially from members of the public, the absence of a power of arrest and the modesty of fines seem to have persuaded most police forces and prosecutors that the results which can be expected do not justify the effort. Where these by-laws are used, they are seen as temporary expedients to show the public that the police are active, or to show prostitutes that the police still have a residuum of control of the streets.

3. The Impact of Other Provincial Laws

There are other elements of provincial law with prohibitive control and regulatory features. Although they do not address prostitution in particular, they can be invoked to deal with some of its side effects. It is unlikely that any of these legal expedients, at least as they presently operate, would be open to constitutional challenge under the division-of-powers doctrine.

3.1 Landlord and Tenant Law

It is customary to find in rental agreements for accommodation provisions that prevent the tenant from conducting himself or herself in a manner that disrupts or inconveniences other tenants in the same building. Typically, rental agreements regarding residential premises also contain provisions prohibiting the tenant from carrying on business out of his or her premises. At common law, breach of provisions such as these allow the landlord to commence proceedings to have the tenancy terminated and the tenant ejected.[19]

In most provinces, legislation has been enacted which either expressly or implicitly protects the landlord's rights in these particulars. Legislation relating to residential tenancies in Alberta, Saskatchewan and Ontario, for example, contains statutory covenants or conditions upon the tenant which oblige him or her not to interfere unreasonably with the enjoyment of the landlord and other tenants of other households, and to refrain from carrying on or allowing illegal businesses or activities on the leased premises.[20]

In each province, in the event of a breach of the covenant or condition, that landlord may apply to a court, rentalsman or rental tenancies commission for a remedy, including termination of the tenancy.[21] Therefore, prostitutes who use their apartments for purposes of prostitution may run the risk of having their tenancies concluded (in addition, of course, to being prosecuted for keeping a common bawdy house).

At a more general level in the landlord and tenant legislation of several provinces, in particular Manitoba, New Brunswick, Ontario and Prince Edward Island, express provision is made for the landlord's right of re-entry where the tenant or other person has been found guilty under the *Criminal Code* of keeping a "disorderly house".[22]

As the definition of "disorderly house" under s. 179(1) of the *Code* includes a common bawdy house, this legislation lends specific sanction to the termination of any lease, including a commercial lease, whenever the premises are being used for the purposes of prostitution or the practice of acts of indecency. As a result, the clandestine social operations of some massage and body rub parlours will be under risk of closure under provincial law as well as prosection under the *Code*.[23]

3.2 Highway Traffic Legislation

Highway traffic acts, or their equivalents in each of the provinces, proscribe the operation of motor vehicles in a way which constitutes a danger or annoyance to other members of the public. More particularly, they contain provisions which prohibit the use of vehicles in such a way as to cause obstructions or unnecessary noise. Such provisions are available to the police in the case of vehicular traffic which is attracted by street prostitution activity. In fact, it appears that these provisions are rarely invoked. The reason most often given by police is the difficulty of acquiring adequate evidence, although, given the notoriety of prostitution in certain urban locations, it is difficult to see why the gathering of proof is such an insurmountable problem.

One police force, that in Calgary, was unsuccessful in its attempt to invoke the "stunting" section of the *Alberta Highway Traffic Act* to convict a street prostitute.[24] Section 125(1) of the *Act* makes it an offence to "perform or engage in any stunt or other activity on a highway that is likely to distract, startle or interfere with other users of the highway." However, that rebuff related more to the Alberta Court of Appeal's feeling that the behaviour of the accused did not fall within the proscribed form of activity, rather than any inadequacy in the evidence. It seems that the general disenchantment of police forces with the overall state of the law relating to street prostitution lies at the root of the reticence to use this type of provincial legislation.

3.3 Nuisance Law

As the judgment of Chief Justice McEachern in *Attorney General of British Columbia* v. *Couillard*[25] demonstrates, it is possible to invoke the notion of public nuisance as a basis for restraining those who engage in street prostitution. The full implications of this judgment have yet to be determined. As has already been pointed out earlier in the Report, there is no doubt that there is solid authority supporting the Attorney General's right to intervene to seek a civil injunction to restrain a public nuisance. Indeed, as Madame Justice McLachlin pointed out in a subsequent attempt by a private citizen to secure an extension of the geographic area of the earlier injunction, in the absence of any proof of peculiar damage to an individual citizen, the Attorney General is the only one who can act in such circumstances.[26] What is left unclear by the *Couillard* decision is how far the Attorney General must go in establishing an actual or anticipated nuisance on the part of the accused. The principles of nuisance law would suggest that he has to prove that the accused has engaged in such conduct before, and can be expected to do so again.[27]

A private individual may bring an action in private nuisance for an injunction and/or damages to restrain or to compensate for the harm done by prostitution. The availability of the action is limited to the occupiers of premises, and is designed to protect their interest in the peaceful and quiet enjoyment of their property. In the absence of tangible harm to the occupier or his property, the degree of interference must be such that no reasonable person should have to suffer it. Actions of this nature against neighbourhood brothels have succeeded in both Canada and England.[28] However, as with most civil litigation, the cost factor often works against enthusiastic pursuit of this option and may be exacerbated by the fact that what the plaintiff may be seeking is an end to the interference or inconvenience rather than compensation.

3.4 Petty Trespass Legislation

Some provinces have petty trespass or protection of property legislation which makes it an offence, punishable by a fine, to trespass on property without the consent of the owner. In some statutes, conviction depends upon explicit notice having been given,[29] whereas in others, breaches may also occur where the trespass is on land which by its character may be seen to belong to someone, for example, a garden.[30]

This legislation has been used from time to time to charge prostitutes who have ventured onto private property.[31] Its viability, of course, depends upon proof of trespass and an intrusion onto land of the type and in the circumstances contemplated by the legislation. Therefore, its applicability is limited.

3.5 Public Health Legislation

Although there are no longer public health provisions addressed specifically to prostitutes, there are sections in contemporary *Public Health Acts* which are general enough to be used against any person or group considered to be a carrier of sexually transmitted diseases (STD's).

Under provincial public health legislation, where a public health official has reasonable grounds to believe that a person is infected with venereal disease, he or she may serve a notice on the individual to undergo medical examination.[32] Furthermore, if the person is found to be suffering from venereal disease, then the official has the power to take the additional step of seeking ministerial or judicial approval to have the carrier confined for treatment until the official is satisfied that the individual is free of infection.[33] Power is also granted to medical health officers or the physicians of jails and correctional institutions to examine persons suspected of being infected with venereal disease within such institutions, and to order their treatment if they are found to be infected.[34]

In Ontario, Newfoundland and Saskatchewan, provisions exist which allow forcible entry to premises by public health officials.[35] In Ontario, legislation permits compulsory examination of the inhabitants on the premises, and in Saskatchewan, there is provision for the closure of dance halls, restaurants and hotels. None of these actions require the authorities concerned to secure a warrant. Generally, under public health legislation, fines are leviable for those who disobey orders made under the legislation, or who are obstructionist or deceitful in their dealings with public health officials.[36]

This legislation is draconian in the sense that it grants to public health authorities the power to detain people without the safeguards provided by the criminal law. As two Canadian legal experts have observed:

> In a criminal trial the onus is on the Crown prosecutor to prove the accusation, not simply to the satisfaction of the judge and jury, but beyond a reasonable doubt.[37]

The same writers have also pointed to the troubling absence of the normal process demanded by the *Criminal Code*, i.e. the issue of a warrant, as a prelude to forcible entry.[38] All of this raises questions about the validity of such provisions in light of the *Charter*.

The tenor of the legislation obviously reflects governmental concern to respond quickly to control possible spreaders of infection. Some public health experts doubt the value of this approach, believing that voluntary and consensual strategies are far more likely to allow them to get to the source of an infection in the community and to deal effectively with it.[39]

Despite the significant powers accorded to public health authorities to direct and detain, there is no evidence from the regional studies conducted for the Committee that these powers are used against prostitutes as individuals or as a group.

The reality seems to be that most adult prostitutes are well aware of the risk of contracting STD's. Accordingly, they take preventative measures to minimize their infection, and tend to have regular check-ups either at public health clinics or by their own physicians. The Committee was advised of one case in which two Calgary males who had had sexual liaisons with prostitutes in Thailand, were found to be infected with an exotic strain of STD. There was concern about its local spread among Calgary prostitutes, and the public health authorities apparently dealt with the matter in a low profile, consensual way.[40]

4. The Utility of these Provisions

In the same way in which the police and prosecutorial authorities demonstrate reticence in utilizing the more general provisions of the *Criminal Code* to combat the side effects of prostitution, so do they in the case of provincial and municipal legislation. The main reason for the reticence is the same: the feeling on the part of the law enforcers that these are, at best, limited and transitory expedients, and that they should not be required to navigate this complex of provisions when the federal Parliament could easily provide an effective means of dealing directly with the problem.

For a short period it did look as if the street prostitution by-laws presented a viable substitute which they were prepared to enforce vigorously. However, the Supreme Court of Canada has closed off that option.[41]

Footnotes

[1] See e.g. Montréal Urban Community By-law 5469, 26 May, 1980; City of Calgary By-laws 25 M 81 and 27 M 81, June 25, 1981.

[2] See Calgary Police Commission, *Street Prostitution* (Brief to Special Committee on Pornography and Prostitution, January 1984).

[3] *R.* v. *Westendorp* (1983), 2 C.C.C. (3d) 330 (S.C.C.).

[4] Montréal Urban Community By-law 333, 3a (in force 1 Nov. 1983).

[5] City of Niagara Falls By-law 84-173, 1984.

[6] To date the by-law has not been passed.

[7] Montréal By-law 333, 3a survived constitutional challenge in *Clermont* v. *The Queen*, April 1984.

[8] For table of charges, see R. Gemme et al, W.P.P.P.#11 at 67.

[9] *City of Prince George* v. *Payne* (1977), 75 D.L.R. (3d) 1 (S.C.C.).

[10] *Red Hot Video* v. *City of Vancouver* (1984), 5 D.L.R. (4th) 61 (B.C.S.C.).

[11] *Information Retailers Association of Metropolitan Toronto Inc.* v. *Municipality of Metropolitan Toronto* 15 Oct. 1984, unreported (Ont. Div. Ct.).

[12] See e.g. *Sharmark Hotels Ltd.* v. *Municipality of Metro Toronto* (1981), 121 D.L.R. (3d) 415 (Ont. Div. Ct.); *Koumoudouros* v. *Municipality of Metropolitan Toronto* (1984) 6 D.L.R. (4th) 523 (Ont. Div. Ct.). Contrast: *Nordee Investments Ltd.* v. *Corp. of Burlington* 25 July 1984, unreported (Ont. C. A.), in which a by-law which attempted to regulate nudity in eating establishments was struck down as an attempt to prohibit any form of activity, including dancing, where there was exposure of breast or buttock. For other examples of cases supporting the proposition in the text, see notes 15 and 18.

[13] City of Saskatoon, By-law 6098, 23 Aug. 1982.

[14] *R.* v. *Dunits* 23 Aug. 1983, unreported (Sask. Prov. Ct.).

[15] *Canada (Eve Studio)* v. *City of Winnipeg*, [1984] 4 W.W.R. 507 (Man. Q. B.).

[16] See e.g. City of Edmonton By-law 4844, 10 Nov. 1976; City of Saskatoon By-law 6066; City of Ottawa By-law L-6; Metro Toronto By-law 107-73.

[17] The by-laws also control the hours of operation; the standards of cleanliness; record keeping; and the location of massage (cubicles or rooms must not be locked). "Massage" typically includes "kneading, manipulating, rubbing, massaging, touching or stimulating, by any means of a person's body or part thereof". Some but not all require that masseuses and masseures have professional qualifications.

[18] *Cal Investments* v. *City of Winnipeg* (1978), 83 D.L.R. (3d) 699 (Man. C. A.); *Re Try-San International Ltd.* v. *City of Vancouver* (1978), 83 D.L.R. (3d) 236 (B.C.C.A.); *Re Moffat and City of Edmonton* (1979), 99 D.L.R. (3d) 101 (Alta. S. C. App. D.). In *R.* v. *Nault* 1983, unreported (Sask. Prov. Ct.), By-law 6855 of the City of Regina was struck down because it allowed only members of the Saskatchewan Association of Masseurs to operate massage parlours in the City. This was invalid, said the court, as the City had no authority to award monopoly business rights.

[19] Williams, Rhodes, *Canadian Law of Landlord and Tenant* (5th Ed. by F. Rhodes, Vol. II, Toronto: Carswell Co., 1983) at 12-43 to 12-48. A right of entry for breach of covenant only arises if given by the lease. In its absence the lessor may have an action for damages.

[20] *Landlord and Tenant Act*, R.S.A. 1980, c. L-6, s. 16; *Residential Tenancies Act*, R.S.S. 1978, c. R-22, s. 20(1), stat. cond. 7(1); *Residential Tenancies Act*, R.S.O. 1980, c. 452, s. 38.

[21] *Ibid.*, Alta, s. 20; Sask., s. 20(1); Ont., s. 41.

[22] *Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 17(2); *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 9; *Landlord and Tenant Act*, R.S.O 1980, c. 232, s. 18(2); *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, s. 10. In Ontario the landlord has the same right of re-entry if the premises are used as a body-rub or adult entertainment parlour, except where the establishment is operated under a license granted under the *Municipal Act*.

[23] See *R.* v. *Ramberran*, [1978] 1 W.W.R. 19 (Man. Prov. Ct.).

[24] *R.* v. *Jones*, [1983] 4 W.W.R. 144 (Alta.S.C.App.D.).

[25] *Attorney General of British Columbia* v. *Couillard* (1984), 14 C.C.C. (3d) 169 (B.C.S.C.).

[26] *Stein* v. *Gonzalez*, [1984] 6 W.W.R. 428 (B.C.S.C.).

[27] In *Attorney General of Nova Scotia* v. *Beaver*, 19 Dec. 1984, unreported (N.S.S.C.), in which like the *Couillard* case the Attorney General of Nova Scotia sought an interim injunction to prevent prostitutes from plying their trade in certain areas of Halifax, MacIntosh, J. sidestepped the issue of whether a nuisance had actually been proven. He found against the Attorney General on the ground that this was an attempt by the province by civil action to usurp the criminal law power of the federal parliament and thus *ultra vires*.

[28] See *Poirier* v. *Turkewich* (1964), 42 D.L.R. (2d) 259 (Man. Q. B.); *Thompson - Shwab* v. *Costaki*, [1956] 1 All E. R. 652 (C.A.).

[29] See *Petty Trespass Act*, R.S.A. 1980, c. P-6, s. 1.

[30] See *Trespass to Property Act*, R.S.A. 1980, c. 511, s. 2, 3; *An Act to Protect Property*, S.N.S. 1982, c. 13, s. 3.

[31] See Lautt, *Project T.A.P. Towards an Awareness of Prostitution: An Empirical Study of Street Prostitution in the Prairie Region* W.P.P.P.#9 at 17.

[32] See e.g. *Venereal Diseases Prevention Act*, R.S.A. 1980, c. V-2, s. 8(1); *Venereal Diseases Prevention Act*, R.S.O. 1980, c. 521, s. 4(1), (2).

[33] *Ibid.*, Alta. s. 9; Ont. s. 4(3), 5, 6.

[34] *Ibid.*, Alta. s. 13, 14; Ont. s. 8, 9.

[35] R.S.O. 1980, c. 521, s. 27; R.S.N. 1970, c. 38, s. 22; R.S.S. 1978, c. V-4, s. 17.

[36] See R.S.A. 1980, c. V-2, s. 27; R.S.O. 1980, c. 521, s. 12(1). In both instances imprisonment is provided for in default of payment.

[37] Rozovsky, *Legal Sex* (Toronto: Doubleday Canada Ltd., 1982) at 71.

[38] Rozovsky and Rozovsky, "Sexually Transmitted Diseases and the Law" (1973) 74 *Can. J. Pub. Health* at 135.

[39] Haug and Cini, *The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases* W.P.P.P.#7 at 15-21.

[40] Interview with Dr. G. Bonham, Chief Medical Officer of Health, City of Calgary, February 1984.

[41] *R.* v. *Westendorp*, note 3.

Chapter 32

Prostitution and the Charter of Rights and Freedoms

The advent of the *Charter of Rights and Freedoms* raises a series of specific questions about the validity of proscriptive or regulatory law relating to prostitution. This is so whether the present law or proposals for amendment are being considered.

Guarantee of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
   - (a) freedom of conscience and religion;
   - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
   - (c) freedom of peaceful assembly; and
   - (d) freedom of association.

Mobility Rights

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

Legal Rights

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right
   - (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Equality Rights

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The three *Charter* decisions in which challenges have been made to the present law on prostitution are basically unhelpful. In one, the issue was dropped; in a second, the decision of the trial judge finding an infringement of the right to livelihood provision of Section 6, was nullified by a subsequent decision of the Supreme Court of Canada in another case; in the third, the judge rejected the argument on infringement without significant elaboration of his reasons.[1] Despite this unpromising start, by considering both the American experience and trends in Canadian judicial thinking in other contexts, it is possible to venture opinions.

Arguments based on freedom of expression in Section 2 by those engaged in prostitution are unlikely to succeed. Our courts may be reluctant to characterize "expression" as including the communications of those who procure or solicit sexual services. Even if they are not, the need to preserve the prostitute from those who would exploit him or her, and to protect the public from harassment and street crime, are likely to be considered more important social objectives than protecting communications of this type.[2] Accordingly, criminal law provisions which appear to conflict with this right may be justified by the invocation of Section 1.

Also doubtful is the success of the argument used before some courts in the United States that laws prohibiting prostitution or soliciting amount to an interference with the right of freedom of association. The latter right is guaranteed by the *Charter* in Section 2. The view of the American courts is that a distinction has to be made between casual associations, such as those engaged in by prostitutes and customers, which are clearly not protected, and serious attempts to form groups dedicated to the political, economic or cultural goals of its members, which are protected.[3] This is an approach which seems likely to appeal to Canadian judges.

It is doubtful, too, whether the argument based on freedom of association would have any more success in the case of the relationship between pimp and prostitute. Although this relationship has some of the attributes of more permanent association, it often involves coercion. Even if the right to association was seen to be applicable in these types of relationships, it would not be difficult for the Crown to make a persuasive argument that the social values in conflict with this exercise of rights are entitled to protection.

The right to gain a livelihood, recognized in section 6 of the *Charter*, received brief recognition as a viable basis for challenging the criminality of being the inmate of a "bawdy house" in *R.* v. *Friesen*.[4] However, that line of argument was effectively closed by the Supreme Court's decision in *Law Society of Upper Canada* v. *Skapinker*.[5] It stated that the right to a livelihood cannot be divorced from the element of inter-provincial mobility, which is referred to in the same section.

The American courts, showing a significant degree of inventiveness, have developed the right to privacy as a constitutionally protected right. The right, which seems to reflect the view that personal autonomy is important in the modern state, has been used to strike down legislation directed at private sexual conduct, for example, the use of contraceptives by married persons, their sale to unmarried persons, and the termination of a pregnancy.[6] However, the courts in the United States have concluded that prostitution, because it is by its very nature commercialized, has thereby a public character which removes from it the protection afforded by the right to privacy.[7]

Although the Supreme Court in *Southam Inc.* v. *Hunter*[8] recognized an element of protected privacy in section 8 of the *Charter*, "the right to be secure against unreasonable search or seizure", it is most unlikely that a right to privacy will be readily conceded by the Canadian courts. The *Charter* does not expressly recognize such a general right, and it is unlikely that, at least in the short term, Canadian judges will wish to be as inventive as their American counterparts. If Canadian judges were to recognize such a right, it would, on the basis of the American experience, provide no protection in the case of the public conduct associated with prostitution, for example, soliciting. There may be greater success in appealing to the right in the case of private sexual conduct for a fee, for example, in a bawdy house, although here again, the element of commercialization might prevent recognition of the right. Assuming that a complainant were to leap the infringement hurdle, a court could no doubt find a more important social purpose underlying the proscription, for instance, the need to protect others from exploitation, which would justify the invocation of section 1.

The equality rights in section 15, if subject to broad interpretation by the courts, might afford protection in some prostitution situations. Clearly the provisions in the Canadian *Criminal Code* which proscribe soliciting, the running of bawdy houses and "living on the avails" could all be characterized as discriminatory. Moreover, the patterns of enforcement of the soliciting provision which effectively victimize the prostitute while ignoring the customer, are unequal in their impact.

It is doubtful whether this section will, in fact, provide much solace to the various interests mentioned. The courts are unlikely to apply this section in a vacuum, and can be expected to make qualitative distinctions between both the claimants seeking its protection and the interests at stake. Bawdy house operators and pimps are not likely to rank very high in the scheme of things, and, therefore, have little chance of invoking the section successfully.

Prostitutes may, however, fare better. They have been subject to a long history of discrimination, and their personal liberty is infringed with greater regularity than that of most citizens. Although American jurisprudence has shown little understanding of the social and legal disabilities of prostitutes, the record of Canadian judges, particularly at an appellate level in dealing with the soliciting provisions in the *Code*, suggests a rather more benign attitude.[9]

The viability of section 15 for challenging the unequal enforcement of the law is not at all clear. In the United States this argument has received little or no sympathy. There the courts have imposed a high standard of proof on the challenger to bring in evidence of discriminatory practices, and have added the requirement that the practice be shown to be deliberate. Even then the courts have been prone to accepting the arguments made by police forces favouring this discriminatory type of enforcement.[10] The Canadian courts have not yet had cause to address this issue.

The availability of section 7 as a basis for challenging the law proscribing prostitution-related activities depends, in part, upon whether the courts see it as having purely procedural significance or possessing substantive qualities. If its effect is merely procedural, then it will only avail challengers in situations in which vagueness is alleged. The American experience, as well as a decision of the Ontario Court of Appeal under the Bill of Rights, suggests that the courts are willing to allow the legislatures a fair degree of leeway in the framing of criminal law provisions.[11] Should section 7 be seen as having substantive content, then it could be used to invalidate the abridgment of the right, rather than the process. The latter is an unlikely development in Canada, as the framers of the *Charter* chose their wording to try and obviate that type of intervention by the court, which has been common in the United States, referring to "principles of fundamental justice" rather than "due process". Furthermore, the Canadian courts have a record of caution when it comes to reading fundamental substantive justice into what appear to them to be procedural protections.

The other legal right which may provide a basis for challenge is that contained in section 11(d) of the *Charter* on the presumption of innocence. It is possible that this could be successfully invoked in the case of the operation of the legislative presumptions (reverse onus clauses) in the *Criminal Code*, including several relating to prostitution offences. Canadian courts have already dealt with reverse onus clauses under the *Charter*, in particular in the context of narcotics control legislation.[12] The message is clear: that unless the presumed fact can be rationally linked to the proven fact or facts, the clause may be struck down. Consequently, clauses such as those which presume the character of a disorderly house from a refusal to grant entrance to a peace officer, and living on the avails from being habitually in the company of prostitutes, may well not survive challenge.

This admittedly speculative survey does not leave the members of the Committee entirely confident about the ability of the courts to use the *Charter* to any significant extent in dealing with the human rights problems surrounding prostitution, except in relation to vagueness under section 7 and reverse onus clauses under section 11(d). A more extensive, positive, judicial response to rights arguments in this field will depend largely on the interpretation given to the equality rights in section 15. All that can be said at this stage is that Canadian judges seem inclined to require a strong reason, such as involvement in other forms of criminal activity or the creation of a discernable public nuisance, for convicting prostitutes of criminal offences. Whether this will translate into acceptance of the argument that prostitutes are, or can be, discriminated against as a group, remains to be seen.

Despite this uncertainty, the Committee has made the assumption, in considering the present law and in fashioning recommendations on prostitution, that possible challenges on the ground of offence to the presumption of innocence and infringement of the equality rights of prostitutes, will receive sympathetic consideration by the courts.

Footnotes

[1] *R.* v. *Westendorp* (1983), 2 C.C.C. (3d) 330 (S.C.C.); *R.* v. *Friesen* 27 April 1984, unreported (Ont.Prov.Ct.), overruled in *Law Society of Upper Canada* v. *Skapinker* (1984), 11 C.C.C. (3d) (S.C.C.) *Attorney General for B.C.* v. *Couillard* (1984), 14 C.C.C. 169 (B.C.S.C.).

[2] See *People of Illinois* v. *Johnson*, 376 N.E. 2d 381 (Ill. C.A., 1978).

[3] *Ibid.*

[4] *Supra*, note 1.

[5] *Law Society of Upper Canada* v. *Skapinker*, *supra*, note 1.

[6] *Griswold* v. *Connecticut* 38 U.S. 479 (Sup. Ct., 1965); *Eisenstadt* v. *Baird* 405 U.S. 438 (Sup. Ct., 1972); *People* v. *Onofre* 424 N.Y.S. 2d 566 (Sup.Ct. App.Div., 1980).

[7] *In re Dora P.*, 418 N.Y.S. 2d 597 (App.Div., 1979).

[8] *Southam Inc.* v. *Hunter* (1984), 11 D.L.R. (4th) 641 (S.C.C.).

[9] See *R.* v. *Hutt*, [1978] 2 S.C.R. 476 418; *R.* v. *Whitter and Galjot* (1981), 64 C.C.C. (2d) 1 (S.C.C.).

[10] See *People* v. *Superior Court of Almeda County* (1977), 562 P. 2d 1315 (Cal. S.C., 1977).

[11] See *R.* v. *Hislop* (1980), 5 W.C.B. 124 (Ont. C. A.).

[12] See *R.* v. *Oakes* (1983), 2 C.C.C. (3d) 339 (Ont. C.A.) (reverse onus provision in *Narcotics Control Act* struck down). For reverse onus clauses related to prostitution in Criminal Code see s. 180(1)(a) and 195(2).

Chapter 33

International Conventions and Agreements Relating to Prostitution

The international community has from time to time directed its attention to prostitution. As a result there are international conventions and agreements which either directly or indirectly address the problems of prostitution.

1. The International Conventions on Prostitution

Prior to 1951, the international agreements pertaining to the active sexual exploitation of women were largely focused on the international traffic in women and children, starting with the "white slave trade" and later broadening into female slavery in general as an appreciation of the global dimensions of the "trade" in women and children emerged. Canada is a party to most of these early accords. Remarkably, however, it is not party to the first Convention which addressed and condemned prostitution per se, the *United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, adopted in 1951.[1]

This agreement, which was the first to recognize male as well as female prostitution, focused upon the exploitation of prostitutes as the dominant problem, calling upon states to adopt laws proscribing procuring, pimping and the operation of brothels.[2] At the same time, states agreed not to take repressive measures against prostitutes, and in particular, not to subject them to special registration regimes.[3] The *Convention* also embodies agreement to use social, educational and health services to combat prostitution and to provide for the rehabilitation and adjustment of its victims.[4]

The 1951 *Convention* is the most recent Convention dealing with prostitution, although its importance and the desirability of further states signing it has been underlined from time to time in subsequent reports and resolutions. In 1959, for example, a report prepared for the Economic and Social Council, among other things, rejected the criminalizing of prostitution as a solution to the problem, although it was ready to countenance provisions penalizing its public nuisance aspects.[5] Until recently, however, the 1951

Convention has been largely ignored. Many countries failed to ratify it, or continued to enforce laws contrary to its provisions. It was not until the 1974 Mexico World Conference on the International Year of Women that governments were pressured to ratify the *Convention* and the U.N. was asked to undertake further study of the issue.

In 1982, a report was commissioned by the Secretary-General to examine implementation of the 1951 *Convention*. The report of the Special Rapporteur, M. Fernand-Laurent, issued in 1983, adopted a feminist/human rights approach to the subject of prostitution, emphasizing the unacceptability of discriminatory practices against prostitutes; the link between pornography and the demand for prostitution; the dangers in procuring, especially where children are involved; and the need to develop programs to demonstrate the personal and social dangers in taking up prostitution.[6] The Report also cautioned against requiring prostitutes to denounce their procurers or pimps, until programs are implemented to train and reabsorb them into society. It further recommended that governments consult with and financially support competent non-governmental groups, including prostitutes' groups, to aid in rehabilitation, as long as the groups do not advocate the recognition of prostitution as a profession.

In the wake of the Report, the Economic and Social Council passed a resolution recommending a series of steps by states: to stop discrimination of prostitutes; to curb the pornography industry; to punish all forms of procuring, especially those involving minors; to develop preventative educational programs, and to train and reabsorb into society those leaving prostitution.[7] A resolution was subsequently introduced and passed in the General Assembly in February, 1984 which, after pointing to United Nations initiatives to protect women and the economic and social conditions responsible for prostitution, called upon states to use humane measures, including legislation, to combat prostitution and to provide protection to the victims of prostitution by education, social guarantees and employment opportunities for them.[8]

2. Canada's Position

Canada's failure to become a party to the 1951 *Convention*, seems to flow from its innate fear of accommodating it in the Canadian federal system and especially the need for provincial agreement on educational, social and public health initiatives. This is more plausible than the lame rationalizations that the *Convention* merely consolidated earlier Conventions which Canada had ratified (the *Convention* in fact contained several novel elements). The country's failure to ratify does not necessarily signify a lack of sympathy with its substance. Canada is a party to the *International Bill of Human Rights* and its constituent documents which, in broad terms, seek to end the exploitation of other human beings.[9] It is also a party to the 1979 *Convention on the Elimination of all Forms of Discrimination against Women*.[10] The latter affirms the equality of men and women in all spheres of life and invites parties to "repeal all national penal provisions which constitute discrimination against women".[11] In addition, article 6 states that "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".

Canada abstained from supporting the General Assembly Resolution of February, 1984 which sought to implement the Fernand-Laurent Report on the grounds that the resolution inappropriately proposed to "combat prostitution" and was basically sexist in nature; that rather than advancing equality for women, it implied that women needed to be protected; and that it did not address the issue of child prostitution. The Canadian delegation, it seems, was not impressed with the rationale of the Special Rapporteur for the absence of reference to male prostitution, which was that the victims of procurement are largely female and that further study is needed on male prostitution. The fact that child prostitution was addressed in the Report appears to have been ignored.

Apart altogether from Canada's record in relation to formal acceptance or rejection of these agreements and resolutions, the Canadian law on prostitution has at least a formal similarity with the legal regime contemplated by the 1951 *Convention*. The identification is not complete because the law in Canada still penalizes prostitutes who are inmates of "bawdy houses". Moreover, Canadian law enforcement authorities and social welfare agencies are not entirely sensitive to the rights of prostitutes to equal treatment by the law and to dignity. In the area of educational, social, and public health strategies of the type anticipated by the *Convention*, Canada is still at a very primitive stage in its policy.

Footnotes

[1] U.N. Treaty Series, No. 1342, 1951. Generally on this topic see D. Sansfaçon, *United Nations Conventions, Agreements and Resolutions on Prostitution and Pornography*, Department of Justice, Ottawa 1984 WPPP # 3.

[2] *Ibid.*, Arts. 1 and 2.

[3] *Ibid.*, Art. 6.

[4] *Ibid.*, Art. 16.

[5] United Nation, *Study on Traffic in Persons and Prostitution*, Department of Economic and Social Affairs, 1959, New York, 12.

[6] Economic and Social Council, Activities for the Advancement of Women: Equality, Development and Peace, *Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, E/1983/17.

[7] U.N. Economic and Social Council Resolution 1983/30.

[8] General Assembly Resolution (A/RES/38/107).

[9] United Nations, Resolution 217 (III). International Bill of Human Rights; A Declaration of Human Rights in D. J. Djonovich, *United Nations Resolutions, Series I - Resolutions Adopted by the General Assembly*, Vol. II, 1948-49, New York, 1973, 135-43.

[10] United Nations, Resolution 34/180. Adopted by the General Assembly, Dec. 18, 1979.

[11] *Ibid.*, Art. 2(g).

Chapter 34

Legislative Proposals for Changes in the Law Relating to Prostitution

1. Introduction

Attempts have been made in recent years to initiate or introduce legislative amendments to the *Criminal Code* provisions on prostitution. With the exception of amendments to section 195(1) to allow for the prosecution of females, as well as males, for procuring and living on the avails, and the extension of the definition of prostitution in section 179 to include both males and females, these attempts have been unsuccessful.[1]

The Standing Committee on Justice and Legal Affairs of the House of Commons undertook a study of street soliciting in 1982, which resulted in a report the following year. In it, a series of recommendations for amendments to section 195.1. were made. While several of these recommendations were embodied in legislation proposed by the Minister of Justice, the Honourable Mark MacGuigan, during 1984, others were not. Specifically, Bill C-19 introduced by the Minister was designed to extend the application of section 195.1 to customers as well as prostitutes and to define "public place" as it applied to that section, so that a motor vehicle in a public place would be covered.[2] The Bill died on the Order Paper with the subsequent proroguing of Parliament.

2. The Report of Justice and Legal Affairs Committee

After extensively canvassing the views of a wide variety of groups, including police, municipalities, residents' associations, women's organizations, social action societies and legal experts, the Standing Committee on Justice and Legal Affairs of the House of Commons issued a report on street soliciting in 1983.[3] On the basis of its study and of the representations made to it, the majority of the Committee concluded that the state of the law on street soliciting under section 195.1, had not been satisfactory since the decision of the Supreme Court of Canada in *R.* v. *Hutt.*[4] As a result, the police in several Canadian cities had been rendered largely powerless to control street prostitution and its perceptible spread to certain residential areas. A minority of members were not satisfied that the present law had been proved to be inadequate. The Standing Committee, as a whole, concluded that in light of the Supreme Court's decision in *R.* v. ***Westendorp,***[5] any criminal law initiative lay exclusively in the hands of the federal Parliament. The option of consigning the problem of street prostitution to the provinces and municipalities to curb it by licensing strategies, was considered neither practical nor desirable.

The Standing Committee was unanimous in concluding that some clarification of section 195.1 was necessary to ensure that customers as well as prostitutes could be charged under the section. Beyond that, there was a divergence of opinion. The majority of the Standing Committee determined that the way to respond to the unsatisfactory situation was to stiffen the impact of the section. Firstly, they recommended that the definition of "public place" in section 179, which applies to section 195, be amended to read:

> Public place includes any place to which the public have access as of right or by invitation, express or implied; or any vehicle situated in a public place, and further includes any private place that is open to public view.

They further recommended the following changes to section 195.1 itself:

> 195.1 (1) Every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction.
>
> (2) For the purposes of subsection (1), "person" shall be deemed to include the person soliciting the services of a prostitute.

This subsection retained the present summary conviction offence of soliciting and put it beyond doubt that a customer, as well as a prostitute, can be charged with and convicted of it. In addition a new offence was included:

> 195.2 (1) Every person who offers, or accepts an offer, in a public place, to engage in prostitution is guilty of an offence punishable by a fine of not more than $500.00, or in default of payment, by no more than fifteen days imprisonment.
>
> (2) For the purposes of subsection (1), "person" shall be deemed to include the person engaging or seeking to engage the services of a prostitute.

This offence would, as the report puts it, "[lower] the standard of prohibited conduct from soliciting to sexual dealing in a public place, while still requiring an overt act".[6] At the same time, the penalty would be less severe than that for soliciting. In the minds of the majority of the Standing Committee, this offence would make it much easier for the police to enforce the law. What is left unsaid is that to secure prosecutions under the new provision, the police would have to use undercover techniques to induce the prostitute or customer to make or accept an offer. The Committee rejected an alternative formulation suggested by one of its members which would have made an "offer to purchase" the offending act, and thus limit prosecutions to customers.[7]

All the members of the Standing Committee were able to agree on the need for a new offence for the punishment of those who seek to purchase or accept sexual services from juveniles:

> 195.3 Everyone who offers or accepts an offer to engage in prostitution with a person under the age of 18 years, whether or not he believes the person is 18 years or more, is guilty
>
> (i) of an indictable offence and is liable to imprisonment for two years,
>
> or
>
> (ii) of an offence punishable on summary conviction.

In making this recommendation, the Standing Committee was mindful of the far more comprehensive study of child prostitution undertaken by the Badgley Committee. However, they felt that the problem warranted an immediate response from Parliament. The Committee was unable to achieve unanimous agreement on the question of whether or not a mistake by the accused as to the proper age of the young person, should be considered relevant. The majority felt that it should not be a defence, preferring to rely on the summary conviction option and prosecutorial discretion to relieve any perceived harshness.

Because of the substantial changes involved in these recommendations, and an admitted lack of thoroughness in the evidence presented to the Standing Committee, the majority recommended a mandatory review clause:

> 195.4 The operation of sections 195.1 to 195.3 shall be reviewed by such committee of the House of Commons as may be designated or established by Parliament for that purpose within three years after the coming into force of these provisions, and the committee shall within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

Although the recommendations of the Standing Committee relating to the inclusion of customers within the term of section 195.1, and the extended definition of a public place, were accepted by the government and included in the Bill, the other recommendations were suspended pending further study and report by our Committee.

Footnotes

[1] *The Criminal Code Amendment Act* S.C. 1980-2, c. 125, s. 11.

[2] *The Criminal Law Reform Act*, 1984, Bill C. 19, c. 48.

[3] Report of Justice & Legal Affairs Committee in Minutes of Proceedings of the Justice and Legal Affairs Committee, issue No. 126 (1983).

[4] *R.* v. *Hutt* [1978] 2 S.C.R. 476.

[5] *R.* v. *Westendorp* (1983), 2 C.C.C. (3d) 330 (S.C.C.).

[6] Report of Justice & Legal Affairs Committee in Minutes of Proceedings of the Justice and Legal Affairs Committee, issue No. 126 (1983) at 5.

[7] *Ibid.*

Section III

Legal and Social Reactions to Prostitution in Other Countries

Summary

In accordance with its mandate, the Committee undertook or had research commissioned into legal approaches and social attitudes to prostitution in a number of other countries. Not surprisingly, the most valuable and instructive information came from countries with social systems and cultural roots similar to those of Canada. In particular, we found the experiences of the United States, England and Wales, Australia, New Zealand and continental European countries helpful in focusing and developing our own views. An examination of the law and social reactions to prostitution in the United States is contained in Chapter 35; that of England and Wales, Australia and New Zealand in Chapter 36; and that of five continental European countries in Chapter 37. Finally, we propose some conclusions in Chapter 38.

Chapter 35

The United States

The United States, with 50 different jurisdictions, and constitutional authority for criminal law reposed largely in the states, exhibits a far more complex pattern of legal proscription and regulation than that in either Canada or Britain. However, there are common elements in the law of a number of states which make it possible to set out at least the general features of the law.[1]

Overall, the law relating to prostitution in the United States is more draconian in substance than its counterparts in Canada or Britain. During the first two decades of the century (the "Progressive Era"), stiff legislation was passed at both the federal and state level to deal with prostitution.[2] This was largely as a result of concern related to a supposed dramatic increase in venereal disease, the "scandal" of white slavery, and the great influx of immigrants who were assumed to be ignorant of American values. Although this legislation has been challenged on constitutional grounds on many occasions, it has emerged largely unscathed from those challenges.

The power of the U.S. Congress to pass criminal law provisions is limited with respect to prostitution. Federal legislation has been limited to the protection of the armed services from prostitution; the denial of entry to aliens for purposes of prostitution; and the interstate transportation of prostitutes or operation of prostitution businesses. The most significant piece of legislation in practice has been the *Mann Act* which was adopted in 1910 to stop the so-called "white slavery" trade.[3]

The major provision in the *Act* proscribes the tranportation of women in interstate or foreign commerce for purposes of prostitution, debauchery or other immoral ends.[4] In practice it has been applied not only to procuring and pimping, but to less evocative situations such as taking a mistress, a potential wife and a secretary over a state line.[5] It is irrelevant that the woman knew and consented as long as the accused had the requisite immoral intent.[6] Special sections are included to deal with the transportation of persons under 21 years of age, and the keeping of an alien woman for prostitution or other immoral purposes.[7]

In recent years, prosecutions under the *Mann Act* appear to have declined, reflecting the existence of more important federal law enforcement priorities as well as the rather dated character of the legislation.

With the exception of certain counties in the State of Nevada in which legalized brothels are countenanced, prostitution or its contexts and side effects are proscribed in every state. The act of prostitution itself is proscribed in 46 states. This means, in theory at least, that there is no immunity for such acts which take place in private. Typically, prostitution is defined as the engaging or the offer to engage with another in sexual conduct for a fee. Soliciting is an offence in 45 states, and loitering in 9. With soliciting there is often the requirement of some overt conduct on the part of the prostitute. Under section 240.37 of the *New York Penal Code*, for example, repeated interference with citizens by stopping them or their cars is required. It is these primarily public offences which are most often used by the police in enforcement.

All states have provisions relating to "pandering" (arranging for or inducing a person to become a prostitute), and to pimping. As well, the vast majority proscribe the keeping of a brothel or "house of assignation". *Red Light Abatement Acts* allow civil actions to be brought against premises used for prostitution, and city ordinances prohibit the operation of massage parlours. With pandering and pimping police enforcement is effectively limited to situations in which a prostitute registers a complaint. In the case of brothels and other sexual service establishments, enforcement again tends to be selective, depending upon citizens' complaints.

Some 20 states have "patronizing" provisions which allow prosecution of customers. Section 232.02 of the *New York Penal Code* provides an example of a definition of patronizing: a person patronizes a prostitute when he pays a fee to engage in sexual conduct, or when he solicits for the purposes of engaging in sexual conduct for a fee. In most states the provisions relating to the practice of prostitution and soliciting and loitering for purposes of prostitution, apply to both male and female prostitutes.

It is still an offence in many states for two adults to engage in "consensual sodomy", whether homosexual or heterosexual, and in the appropriate circumstances, prostitutes and their customers have been charged with that offence. In a minority of states related laws proscribing vagrancy, fornication and adultery have been used to prosecute prostitutes.

As one would expect in a country with such vast demographic divergences, the forms of prostitution and enforcement vary. Despite the seemingly harsh state of the law in almost every jurisdiction, overt prostitution exists and often flourishes in major urban centres such as New York and Los Angeles. In much smaller centres and rural areas there is usually no visible problem, although prostitution often occurs behind closed doors. In large cities, apart from occasional "clamp downs", the police can do little more than "chase" the problem. In an area like Manhattan, for instance, despite the best efforts of the

Public Morals Division, and arrest figures which have climbed from 11,000 in 1979 to 15,000 in 1983, street prostitution thrives.

Prostitution in other forms is dealt with on an admittedly selective basis, in response to citizen complaints and the perception that the local community is suffering. By contrast, given the necessary will on the part of the police, effective enforcement against street prostitution, in particular, is feasible in smaller centres and is no doubt assisted by more general social pressures. Except in those states in which there are loitering provisions, the normal method of enforcement is the use of decoys. They are typically male and the prostitute is usually the victim of the exercise. However, some forces do periodically use female officers as decoys and arrest customers.

The notorious exceptions to the nationwide pattern of law and enforcement in the United States are the counties in Nevada which have legalized brothels.[8] That state has seven counties in which prostitution is legal. In five others, the legalization of prostitution is provided for by local option.

The typical county ordinance contains a preamble which relates the ordinance to the objectives of reducing the incidence of venereal disease and the crime rate. It then goes on to establish a board comprising the county commissioners, the sheriff and the district attorney to authorize brothel licences and to regulate their operations. The ordinance contains details of the licensing procedure, provisions for the registration of each prostitute and a requirement of weekly health examinations for all brothel prostitutes.

Each prostitute must carry a valid police card which is issued only after fingerprinting and a check for any previous police record, excluding prostitution offences. Details of licence fees for the establishments also appear in the ordinance. Some of the ordinances also specify the number and location of the brothels. Municipal codes in the communities which contain brothels are much briefer, merely stating that various forms of prostitution-related activities are illegal, except the operation of a brothel in a specified location or area.

In addition to these official requirements, each community has customs governing the operation of the brothels or "ranches" and the conduct of the prostitutes. These are characteristically very limiting, and in some instances, repressive. In Winnemuca, for instance, prostitutes must leave town on their time off; their families cannot live in the community; their cars must be registered with the police and their use is very limited. Men are not allowed to operate brothels and men other than customers can go to the premises only if on legitimate repair errands. Finally, no non-resident female can visit a brothel or drive through the area, apparently to deter "angry wives" from pursuing their spouses "across the line". If a prostitute breaches one of these regulations her card is confiscated and she has 24 hours to leave town.

There has been increasing criticism of these "customs", the impingement on civil liberties involved and the fact that they lack legislative form or sanction. The authorities are reported to be less than enthusiastic about a move in the latter direction lest it open a debate on the whole issue of legalization.[9]

In recent years, the issue of prostitution has become a matter of vigorous debate in the United States. Civil liberties and feminist groups, as well as prostitutes themselves, have been at the forefront of advocating the decriminalization of prostitution and associated offences such as soliciting and loitering. Their recommendations are based on what they argue is an interference with the prostitute's right to privacy. They also emphasize the constant harassment and abuse to which prostitutes are subjected, and the abject failure of repressive laws to deal with the root causes of prostitution, let alone its annoying features. The Nevada "model" of legalization and regulation is considered, if anything, worse than the status quo, because it approaches a form of legalized servitude.

Legislatures have generally been slow to move. Although more and more states are repealing antiquated provisions penalizing sexual activities in private, there seems to be no action to overhaul the law relating to prostitution. Most courts have taken a conservative approach, rejecting a series of arguments that the prostitution offences contravene the Constitution. Accordingly, criminal and regulatory-law has remained largely intact.

Footnotes

[1] See D. Sansfaçon, ***Pornography and Prostitution in the United States*** W.P.P.P.#2 at 27-41.

[2] M. Conolly, ***The Response to Prostitution in the Progressive Era***, Chapel Hill: University of North Carolina Press, 1980.

[3] The official title was the ***White Slave Traffic Act***, U.S. Statutes at Large, 1910, Vol. 36, at 825-7.

[4] ***Ibid.***, s. 2421.

[5] ***Caminetti*** v. ***United States***, 242 U.S. 470 (1917); ***Rockwell*** v. ***United States***, 111 F. 2d 452 (1940, Circ.C.A., 9th Circ.); ***Simon*** v. ***United States***, 145 F. 2d 345 (1944, Circ.C.A., 9th Circ.); ***White*** v. ***United States***, 261 F. 2d 907 (1959, Circ.C.A., 6th Circ.); ***Cleveland*** v. ***United States***, 329 U.S. 14 (1946); ***Burgers*** v. ***United States***, 294 F. 2d 236 (Circ.C.A., 9th Circ.), Cert. denied 274 U.S. 747 (1927).

[6] ***Qualls*** v. ***United States***, 149 F. 2d 894 (1945; ***Hart*** v. ***United States***, 11 F. 2d 499 (1926, Circ.C.A., 9th Circ.); ***Hattaway*** v. ***United States***, 399 F. 2d 431 (1968); ***United States*** v. ***Pelton***, 578 F. 2d 701 (1978, Circ.C.A., 8th Circ.).

[7] ***White Slave Traffic Act***, U.S. Statutes at Large, 1910, ss 2422-2424.

[8] E. Pillard, "Legal Prostitution: Is it Just?" 2 ***Nevada Public Affairs Review*** 1982, at 43.

[9] Recent press reports from Nevada suggest that investigation is underway of the conduct of the police in the town Winnemuca in regulating prostitution and the local "ranch".

Chapter 36

Commonwealth Countries

1. England and Wales

The social realities of and legal reactions to prostitution in England and Wales parallel very closely those in Canada. As in Canada, prostitution itself has never been considered a legitimate focus for criminal law proscription, at least as far as females are concerned. Male prostitution, which falls within the designation of indecency between men, is proscribed without the exceptions recognized by section 158 of the Canadian *Criminal Code* (i.e. consensual and private liaisons between two adults of 21 years or older).[1] As in Canada, it is the contexts and side effects of prostitution which normally draw sanctions.

The offences of keeping or permitting the use of premises as a brothel are similar to the equivalent bawdy house provisions in the *Criminal Code*.[2] However, the English law does not penalize the inmates or those found in a brothel. Furthermore, by judicial interpretation, it is not an offence for a single prostitute to use her place of residence for purposes of prostitution.[3]

The *Sexual Offences Act* distinguished between the procuring of a woman and that of a girl under 21 years of age. The former is related to prostitution, the latter to "unlawful sexual intercourse".[4] Unlike their Canadian counterparts, these provisions are brief and to the point. The offence of living on the earnings of prostitution is similar to the Canadian offence of "living on the avails", and is similarly reinforced by a presumption.[5] However, the presumption is wider than that in section 195 of the *Criminal Code*, which includes both living with and being habitually in the company of prostitutes, and the exercise of control, direction or influence over a prostitute's movements.

In the case of street soliciting a distinction is made between the activities of male and female solicitors. Under section 32 of the *Sexual Offences Act* it is an offence for a man "persistently to solicit or importune in a public place for immoral purposes". Therefore, an intention to prostitute is not required. By contrast, section 1(1) of the *Street Offences Act* requires that for a "common prostitute" (i.e. a known female prostitute) to be guilty of an offence she must "loiter or solicit in a street or public place for the purpose of prostitution".

Unlike section 195.1 of the Canadian *Criminal Code*, the Crown has to establish that the woman was a "common prostitute", but has the option of alleging either loitering or soliciting. In practice, the loitering route is used more frequently by the police, because it does not require evidence of importuning or harassment. Furthermore, it can be enforced without resort to undercover stratagems. "Cautioning", an interesting procedure which originated in Scotland, has been grafted onto the law in this area.

Where the police have observed the activities of one who is loitering or soliciting and who has not been previously convicted, they will caution her about her conduct and the implications of continuing to work the streets. If she is found loitering or soliciting a second time, a second caution is issued. A third incident brings a formal charge. This device, which was designed to provide a means whereby novice prostitutes might be persuaded of the error of their ways and directed towards helping agencies, has been a failure in practice, because the "message" is rarely taken.[6]

As evidence that the English law has been less sensitive than its Canadian counterpart to the traditional double standard in culpability, there is no provision under which the customer of a street prostitute can be charged for his part in initiating or carrying through the liaison.

As in other countries, law reformers in England and Wales continue to struggle with the issue of how best to control the less desirable consequences of prostitution. The Criminal Law Revision Committee has been particularly active in this regard, and has canvassed a broad spectrum of opinion in formulating its positions.[7] However, there does not seem to have been the same concern, at a national level at least, to investigate and address the social roots of the problem of prostitution.[8] To date, at least, the assumption seems to be that prostitution is a social fact, and that all that can reasonably be done, apart from haphazard application of social service strategies, is to fashion the law to contain as far as possible the problems of exploitation and public nuisance associated with prostitution.

Despite the fact that the *Street Offences Act 1959* strengthened the law against street prostitution, the law has not been successful in ridding the streets of prostitutes. Indeed, the evidence is that in certain cities and locations they frequent the streets in increasing numbers. The frequency and intensity of enforcement varies between cities and within them, depending upon police priorities and philosophy, the sufficiency of human and financial resources and the level and focus of complaints from the public. Selective enforcement also seems to obtain in relation to the other prostitution-related offences, i.e. running common bawdy houses, procuring and pimping, and the police do not appear to be any more successful in using the law to get at the pimps and procurers than they have been in Canada.

The depth of the public's concern fluctuates depending on whether as individuals or as a group, they feel threatened by prostitution. As in North America, some neighbourhoods tolerate it while others object strenuously.

Several recommendations or suggestions have been made in recent years by the Criminal Law Revision Committee for improvements in the law. The Committee has recommended that the present provisions on "brothels" replace that word with a reference to premises used for purposes of prostitution. Moreover, it is suggested that the immunity from prosecution under the law given to a single prostitute working out of her residence should be extended to two prostitutes sharing a residence.

The rationale for this is that such a move would give more security to prostitutes, allowing them to share living facilities and child care responsiblities, and to provide each other with emotional support and companionship. It might also lead to a reduction in street prostitution.

The Committee is not willing to extend the number beyond two, lest what it describes as "nests of prostitutes" are encouraged. Moreover, it is not in favour of prostitutes, even in small numbers, setting up commercial "trick pads" away from home, as this would inevitably lead to the commercial exploitation of prostitution, as well as to unreasonable interference with the use and enjoyment of adjacent premises by neighbours.[9]

The Committee has also considered procuring and living on the earnings.[10] On procuring it has suggested that the present provisions be replaced by more detailed and extensive sections covering the organization of prostitution generally; advertising the services of prostitutes; the arranging or facilitating of the making of contracts for prostitution; and living on the earnings. Such a provision, which would encompass much more than the present law, seems to reflect a strong opinion that the commercialization of prostitution should be hit hard by the law. Included would be the touts, transporters, escort service and massage parlour operators and anyone else advancing prostitution.

On pimping, the Committee sees the direction or control of the prostitute as more disturbing than merely living on the earnings and would make that the focus of the law, elevating it from the position of a mere presumption.

With street prostitution, the Committee has recommended the dropping of the term "common" as pejorative, but insists on retaining the condition that the accused be a prostitute. Obviously sensitive to criticisms that the present law embodies an unjustifiable double standard, they have further recommended the addition of an accosting offence which would cover the use of a motor vehicle for the purpose of soliciting a woman for prostitution; the soliciting of a woman persistently for purposes of prostitution, and the soliciting of a woman for "sexual purposes" in a way likely to cause her fear. The double standard is retained, but in a far less extreme form. The Committee wishes to retain the current distinction in the law between male and female soliciting, but suggests that soliciting for "sexual purposes" be substituted for the present reference to "immoral purposes".[11]

The recommendations and suggestions of the Committee are based on the view of the Wolfenden Committee that the function of the criminal law is:

> To preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are weak in body or mind, inexperienced or in a state of special physical, official or economic dependence.[12]

The Committee also shares the Wolfenden view that it is not the function of law to intrude into the private lives of citizens or to enforce particular patterns of behaviour, other than to carry out the legitimate functions of the criminal law. The law, especially if subjected to the fine tuning suggested by the Committee, will, they feel, strike a reasonable balance between the two objectives of the protection of the public and the immunity of private liaisons. Furthermore, the Committee believes this is an accurate reflection of public opinion.

In short, the Committee seeks to preserve what it sees as a pattern of sound values underlying the evolution of the English law relating to prostitution, and rejects any radical departure from the pattern, either in the direction of regulation or decriminalization, although both were recommended by certain interest groups to the Committee. The report gives little consideration to problems of enforcement, apart from recognizing that they exist, and the impression is left that the Committee sees the role of the law as that of selective pro-active or reactive control.

2. Australia

Unlike the *Canadian Constitution* the Australian Constitution gives jurisdiction over criminal law to the states. There are eight Australian criminal law jurisdictions: the states of New South Wales, Victoria, South Australia, Western Australia, Queensland and Tasmania and the Northern and Australian Capital Territories. This analysis of Australian law on prostitution focuses on five states (excluding Tasmania, the smallest).[13]

Australian criminal law is largely derived from the common law of England. In New South Wales, Victoria and South Australia, significant bodies of statutory-law have been enacted which coexist with the common law except insofar as the legislation has not replaced or amended the common law. In both Queensland and Western Australia, wholesale restatement of the criminal law in codified form has occurred.

The law relating to prostitution varies considerably across the five states. In Queensland and Western Australia it represents an intriguing blend of English law as it was at the turn of the century and several indigenous provisions related to the perceived problems of a frontier society. South Australia retains the traditional core of English law but over the years has instituted modest amendments to remove anacronisms and address special problems. In New South Wales and Victoria the law embodies an amalgam of some traditional provisions and extensive reworking of the law to reflect more modern thinking and realities. In New South Wales this latter movement has involved a degree of decriminalization of prostitution-related activity; in Victoria recent steps have been taken to move from a proscriptive to a regulatory regime for some types of prostitution establishments.

The codified systems in force in Queensland and Western Australia adopt a draconian attitude to sexual offences in general, and prostitution-related activity in particular. Homosexual activity between consenting males remains an indictable offence in both jurisdictions,[14] which means that the prostitution law relates exclusively to female prostitution. Street prostitution is still dealt with as a form of vagrancy, in which merely loitering in a public place for purposes of prostitution is culpable,[15] paralleling the state of Canadian law prior to 1972. As in England, homosexual soliciting in public is related to "immoral purposes" rather than to "prostitution",[16] reflecting the harsher approach to homosexual activity in both jurisdictions.

Like street prostitution, "living on the earnings of prostitution" is considered a vagrancy offence. In Queensland the offence is complemented by a presumption similar to that in section 195(3) of the Canadian *Criminal Code*, i.e., living with or being habitually in the company of prostitutes, but with the alternative factor of "no visible" or "insufficient" means of support.[17] This presumption is absent in the equivalent Western Australian provisions. The latter dubs a person convicted of the offence a "rogue and vagabond".[18]

Both states have offences relating to the keeping of brothels[19] included in vagrancy legislation as well as in their *Criminal Codes*, although it appears that vagrancy legislation is more regularly invoked. The vagrancy provisions apply to the operations of an individual prostitute, as well as to commercial establishments. The law in Queensland includes a subsection which specifically empowers the owner of an establishment which he has reasonable grounds to suspect is being used as a brothel to serve the occupier with a notice to quit.[20] The statute also contains a bizarre provision which requires the occupier of premises suspected of being a brothel by "any two respectable citizens" to provide the Police Commissioner with information on the inmates of the premises on peril of a fine or imprisonment if he fails to do so.[21]

In 1971, public concern at the growth of the massage parlour industry in Queensland led to the inclusion in the vagrancy legislation of a proscription against "using" such establishments for purposes of prostitution.[22] The effect of this provision is to make prostitution per se illegal in such establishments when more than an isolated liaison is involved.

Under the criminal codes of both states, exploitation and procuring is addressed in a series of sections which cumulatively read like section 195(1) of the Canadian *Criminal Code*.[23] A clue to the vintage of these provisions is given by a common subsection which absolves the inmate of a brothel of any legal responsibility for taking and using clothing which is not her own in order to enable her to leave the establishment.[24]

In Queensland, prostitution tends to take place off the streets in massage parlours or through escort services. The police evince some frustration at the present law which is very strict in the case of prostitution establishments such as massage parlours, but makes no special provision for the prosecution of escort services. Although no reforms, other than the 1971 amendments on massage parlours, have been made in recent decades, the authorities are monitoring developments elsewhere and reform is anticipated in the future. In Western Australia official police policy is one of "conditional toleration and containment", with activity directed towards maintaining an acceptable standard of conduct by participants and keeping the trade as free as possible of criminality, public annoyance and the exploitation of juveniles.

The law in South Australia has some similarities with that in the former jurisdictions. However, it seems to reflect a less draconian and dated attitude towards prostitution-related activity, as well as containing one or two unique provisions. The street prostitution provisions follow the pattern of proscribing both soliciting and loitering discussed earlier, but apply equally to both male and female prostitutes.[25] A unique provision allows a police officer to enter any place of public entertainment whenever he thinks proper and order any "common prostitute" to leave it, with penalties attached to refusal to comply, or to returning to the establishment.[26] The provision, which was introduced in 1936, is designed to control prostitution activity in night clubs and bars.

The offence of living on the earnings is similar in substance to that in Queensland, but has a more demanding presumption which requires proof of "living with", being "habitually in the company of" *and* having "no visible means of support".[27] A second unique provision makes it a specific offence to receive "any money paid in a brothel in respect of prostitution".[28] The section makes subject to sanction not only the financial rewards of brothel owners and managers, but also prostitution itself when it occurs in a brothel.

The keeping of a brothel is an offence in South Australia, although prosecution is contingent upon the written consent of a senior police officer.[29] Moreover, not only is there a provision penalizing landlords who permit their premises to be operated as brothels, but also the landlord of leased premises which have been so used can order an assignment of the lease.[30] The Supreme Court of South Australia has recently determined that the common law offence of "keeping a common bawdy house" still obtains in the state with a penalty which is much more severe than that in the *Police Offences Act*.[31] The offences of exploitation and procuring are also recognized, but are stated more simply than their counterparts in Queensland and Western Australia.[32]

In an interesting example of guilt by association, the *Police Offences Act* makes it an offence to consort with or, as an occupier of premises, to "harbour" prostitutes.[33]

Street prostitution in South Australia is minimal and the police report that as a result of greater vice squad attention, the number of brothels has decreased. In contrast, escort services have proliferated because they are not specifically proscribed by existing legislation.

A 1980 report by a legislative committee in South Australia made a number of recommendations for reform of the law relating to prostitution.[34] The most significant recommendation was that certain elements of prostitution-related activity be decriminalized, in particular non-violent procuring and living on the earnings of adult prostitutes, and consorting with reputed prostitutes. The suggested amendments narrowing the definitions of procuring and pimping reflected the committee's view that the law should not intrude into consensual, non-violent relationships between adults. Regarding brothels, the report seems to have accepted the presence of massage parlours in industrial or commercial areas, but stated strongly that the law should be used to prevent their spread to residential areas. The report advocated the retention of anti-soliciting provisions in the criminal law, but recommended their application to both prostitutes and customers. To date, no action has been taken on these recommendations.

New South Wales, the most populous and urbanized state in Australia, instituted major reforms of the law relating to prostitution in 1979 as part of a general policy of decriminalizing "victimless crime".

The offence of street soliciting was repealed in 1979, although under the *Offences in Public Places Act* of that year a more general offence of conduct close to a public place or school causing reasonable people to be "seriously alarmed" or "affronted" was enacted.[35] This provision was utilized to charge homosexuals who were soliciting prior to 1984 when homosexual conduct between consenting adults ceased to be a crime in the state.

Because decriminalization resulted in a dramatic increase in a residential suburb of Sydney, the *Prostitution Act* of 1979 was amended in 1983 to proscribe soliciting near a dwelling, school, church or hospital for purposes of prostitution (as well as the same activity in a school, church or hospital).[36] The effect of this is to prohibit soliciting in residential areas whether by males or females. The provision in the *Offences in Public Places Act* was also amended to refer clearly to persons of either sex engaging in offensive conduct.[37] The effect has been to reduce significantly the level of soliciting in the residential suburb which had been adversely affected.

The *Prostitution Act* of 1979 retained proscriptions against the more repugnant aspects of prostitution. Thus under section 5, living wholly or in part on the earnings of prostitution is an offence which is tied to a presumption similar to that in South Australia.

The present state of the law in New South Wales regarding brothels is confused. Although the repeal of the *Summary Convictions Offences Act* in 1970 abolished brothel-keeping offences, section 6 of the *Prostitution Act* of 1979 made an offence out of using or keeping a massage parlour, bath house, etc. for purposes of prostitution, on the apparent ground that this amounted to false advertising; in other words, a brothel should be called a brothel. However, the *Act* also makes it an offence for an operator to advertise that he is running a brothel.[38] So although it is legal to run a brothel, it is illegal to advertise that fact.

The situation has been further complicated by a decision of the Supreme Court of New South Wales that the *Disorderly Houses Act* of 1943 is still in force, on the ground that the *Prostitution Act* is not a complete code of the law in this area.[39] The 1943 *Act* allows a judge, on application citing reasonable grounds for suspicion, to declare any premises a disorderly house, with penalties for continuing to operate it as such, as well as for those who frequent it. The police have full powers of search and seizure in the case of premises declared a disorderly house.[40] As in Canada, a "disorderly house" includes a brothel or common bawdy house.

On exploitation and procuring, New South Wales has adopted a simple provision making it an offence:

(a) to procure, entice or lead away a person, not being a prostitute, for purposes of prostitution;

(b) by fraud, violence, threat or abuse of authority, or by use of a drug or alcohol to procure, entice or lead away *any person* for purposes of prostitution.[41]

Prostitution has been a problematic and controversial subject in New South Wales in recent years, and a parliamentary sub-committee was established in 1984 to inquire into all aspects of the activity in the state. The Committee will be making recommendations in due course.

Like New South Wales, Victoria has a body of criminal law which is an amalgam of the common law and statute. Street soliciting and even loitering for the purpose of prostitution are still offences, although unlike Queensland, Western Australia and South Australia the provision is drawn so that customers can be charged.[42] Police women posing as prostitutes are used for this purpose. Police practice is to proceed against prostitutes under the loitering option. While the soliciting and loitering provision apply to both male and female prostitutes, it is still possible to charge homosexuals with soliciting for "immoral sexual purposes".[43]

Living on the earnings of prostitution is an offence under the *Vagrancy Act* with a presumption which extends not only to living with or being habitually in the company of, but also to proof of control over action, or influence over the movements of a prostitute.[44] Interestingly, too, a justice may, in response to an "information on oath" that there is reason to suspect that a house is being used for prostitution and that residing within is someone living on the earnings of the prostitute, issue a warrant to the police to enter and search and to arrest the former and bring that person to court to answer a charge.[45]

The law in Victoria in relation to brothels has undergone significant change recently. The purpose of the *Planning (Brothels) Act* of 1984[46] is to legalize and regulate licensed brothels, while providing harsher penalties for prostitution-related activities taking place in unlicensed brothels.

The *Act* is a response to the proliferation of massage parlours in the state and flows from the report of a working party set up by the state legislature, which advocated controlling the problem by means of zoning mechanisms.[47] The *Act* deals with;

(a) control of the location of brothels;

(b) control of the ownership of and access to brothels; and

(c) the abolition of offences for prostitution-related activities in brothels.

The 1984 legislation amounts to an amendment of the *Town and Country Planning Act* of 1961.[48] That *Act* sets out a detailed regulatory process for general and specific urban and rural planning in Victoria. By section 9, local authorities are empowered to approve "planning schemes" for those areas which *may* include certain matters, for example, provisions prescribing, prohibiting or regulating the use of land or buildings for specific purposes; on the power of entry and inspection and on enforcement. Under section 27, an authority which has developed a "planning scheme" may issue a permit containing any conditions required by its scheme, subject to various notice and appeal requirements under the *Act*. Rejected permit applicants have a right of appeal to the Minister of Planning and Environment.

The 1984 *Act* does not regulate the location of brothels themselves. Rather it establishes them as a use of land for which a permit may be issued under the *Town and Country Planning Act*. "Brothel" is defined in the *Act* as "Land to which people of both sexes, or of either sex, resort for purposes of prostitution."[49]

Although the definition has been incorporated as a form of land use in the Melbourne Metropolitan Planning Scheme, other municipal authorities have rejected it or have the power to reject it.

The Ministry of Planning and Environment has produced guidelines to assist planning authorities in making brothel location decisions, and to provide a rational and consistent basis upon which to determine permit applications.[50] The guidelines include:

(1) Stipulations on the zones in which brothels may be permitted (office, business, industrial, "public purpose" and special use zones) and prohibited zones (residential, rural, farming, conservation and landscape interest);

(2) Methods of protecting residential property in non-residential zones and retail premises in commercial zones;

(3) Prescribed distances from schools and other institutions to which children resort;

(4) Desirable distances from churches, hospitals and other community facilities;

(5) Requirements for neighbourhood lighting and the clear identification of brothels in multi-use buildings;

(6) Provisions to prevent clustering of such establishments;

(7) Prescriptions on relevant zoning classifications relating to the size of brothels.

The guidelines also specify the procedures to be followed in an application for a brothel permit. All applications are to be considered on their merits in zones in which the use is not expressly forbidden. All applications must be advertized, and outline fully the plans for and detailed operation of the facility. Permits may be issued for a limited time to allow the planning authority to monitor its effect on the neighbourhood.

The 1984 *Act* contains effective measures to ensure that its provisions are not being contravened:

Under section 49A(1A):

(1) A police officer can enter such an establishment at any reasonable time when he has reasonable grounds for believing that an establishment is being used as a brothel, to determine whether contraventions of the planning legislation or scheme are taking place;

(2) By virtue of section 49, the penalties for failing to comply with planning controls have been increased to ($6,000.00 (Aust) maximum for a first offence and $9,000.00 (Aust) for a second, with $600.00 (Aust) maximum for each day of a continuing infraction);

(3) A court may declare that one who contravenes the planning law, scheme or conditions of the permit in operating a brothel is not eligible to hold a permit to run a brothel for up to 10 years according to section 49(1B);

(4) The Supreme Court may declare that an establishment is a proscribed brothel where satisfied that an establishment is being run without a permit, or that certain specified offences are taking place within it, the declaration being publicized in the Government Gazette; the police in turn are empowered to publicize the declaration within the community (section 49F and G);

(5) It is an offence:

(a) to enter or leave a proscribed brothel, unless the accused can prove he was on a lawful purpose, or ignorant of the declaration;

(b) to have a serious criminal record and be found in a proscribed brothel;

(c) to run a business, trade, profession or calling from such an establishment;

(d) for the owner of the premises to allow the establishment to be run as a brothel, unless he took all reasonable steps to evict the occupier; and for an occupier to permit it, unless he can prove that he took reasonable steps to prevent such use (sections 49(I) and 49(M));

(6) The police are given sweeping power to enter the premises forcibly at any time under section 49(N).

Under section 49(E), brothels which are granted permits are subject to prescribed health requirements for the protection of both prostitutes and customers. A permit may not be granted to anyone who has been convicted within the previous five years of a drug related or indictable offence punishable for one year or more, nor to any person where the owner or occupier of the land has been so convicted (section 27A). By the same section, if a permit is granted and it is later found that the grantee is ineligible because of a conviction it may be revoked within 35 days. Furthermore, it is an offence for a permit holder to allow a person under the age of eighteen to enter or remain in a brothel by virtue of Section 49D.

To prevent the concentration of brothels in the hands of one person or company, the law prohibits a person holding an interest in more than one permit; interest is defined in terms of a grant to him personally, to his company, to a business associate, contractual partner or spouse (section 49C).

Although the criminal law which proscribes the operation of brothels and certain activities within them remains,[51] the relevant legislation has been amended by the *Planning (Brothels) Act* of 1984 to abolish penalties for prostitution activities in brothels with a planning permit. Thus it is no longer possible for the operator of a licensed brothel to be convicted of living on the earnings of prostitution, operating, using or leasing premises as a brothel, or keeping a "disorderly house".[52] Moreover, an amendment to the *Summary Offences Act* reduces the possibility that a person can be charged with soliciting in a licensed brothel.[53] The 1984 *Act* has not, however, affected the application of procuring offences.

The major provisions of the *Planning (Brothels) Act* came into operation on July 2, 1984. Certain provisions were not proclaimed immediately to allow an amnesty period for existing illegal massage parlours to obtain planning consent.

Under the *Crimes Act* of Victoria, it is an indictable offence to detain persons against their will in premises for purposes of illicit sex, or in brothels.[54] The *Act* also contains two general and simple procuring provisions which make it an offence to procure or attempt to procure (a) "a person to become a prostitute in any part of the world", and (b) "a person who is not an inmate of a brothel to become an inmate of [one] in any part of the world"[55].

By judicial interpretation, the essence of procuring is that the accused took some action, whether in the form of pressure, persuasion, inducement, proposal or otherwise, which influenced the mind of the other person to engage in sexual conduct, and that the accused intended that result.[56]

The bold steps taken by the state of Victoria in allowing the establishment and maintenance of brothels, subject to those regulations, has not exhausted discussion and debate on prostitution in that state. An "Inquiry into Prostitution" was established by the government in September, 1984 to

> enquire into and report upon the social, economic, legal and health aspects of prostitution in all its forms insofar as those matters are relevant to the powers and functions of the Victorian Parliament and Government.[57]

The Inquiry must present its report by September 1, 1985 and include recommendations on further reform and amendment of the law.

Communication with the individual in Victoria conducting the Inquiry suggests that it is too early to gauge the impact of the *Planning (Brothels) Act*, although some potential problems are perceived with it. Although it seems to have been accepted with equanimity in urban areas, there has been hostility in rural areas with the result that some rural municipalities are endeavouring to zone out brothels. This has raised questions over whether local government is the proper place to repose jurisdiction. A second concern is that the provisions for enforcement will prove difficult to apply, because of uncertainty over the identity of the real owner. This has lead to a suggestion that it should be the manager who is licensed and takes legal responsibility. Moreover, it seems as though land in zones where brothels may be approved is rising in value. This may mean that only the wealthiest entrepreneurs can afford to operate such establishments. Until more time has passed, it remains to be seen how this combination of decriminalization and planning law will work.

3. New Zealand

The law in New Zealand on prostitution-related activities is contained in three statutes and is similar to that in England and Wales, with one notable exception.

As in Canada, England and Australia, prostitution itself is not a crime. A revised street soliciting provision was introduced in 1981 which makes it an offence subject to a maximum fine for a person to offer "his or her body or any other person's body, for the purpose of prostitution".[58] This provision, which is similar to that proposed by the Canadian House of Commons Justice and Legal Affairs Committee in 1983,[59] is broader than the section it replaced which required both the elements of "loitering" and "importuning".

Living on the avails of prostitution is an offence which is similar in substance to that defined in section 30(1) of the United Kingdom *Sexual Offences Act* of 1956,[60] except that it applies to both male and female perpetrators and contains no presumption.[61]

In New Zealand the procuring provision in the *Crimes Act* states quite simply:

> Everyone is liable to imprisonment for a term not exceeding five years who, for gain or reward, procures or agrees to procure any women or girls to have sexual intercourse with any male who is not her husband.[62]

The provisions on keeping, managing or being the lessor or landlord of premises being used as a brothel are modelled on the *Criminal Law Amend-*

ment Act 1885 (U.K.).[63] However, the statutory definition of brothels in New Zealand makes it clear that in contrast with the English situation, the term includes one woman working out of a residence.[64] As in Canada "prostitution" has been interpreted broadly to extend to any indecent sexual act for payment.[65] In recent years the *Crimes Act* has been amended to include a parallel provision relating to homosexual brothels. Interestingly, the maximum penalty for conviction is twice that for the female offence.[66]

The unique feature of the New Zealand law on prostitution-related activities is embodied in the *Massage Parlours Act* of 1978.[67] This statute was passed in response to concern over increasing evidence of prostitution services being provided by massage parlours. However, unlike the state of Victoria in Australia where the reaction has been to allow and regulate the provision of such services by massage parlours, in New Zealand the approach has been to try and stamp it out. The purpose of the legislation then is to control the operation of such establishments with a view to ensuring that they are not used as brothels.

After defining "massage" to include "rubbing, kneading, or manipulating the human body or any part of it, whether for the purpose of relaxing muscle tension, stimulating circulation, increasing suppleness or otherwise" the *Act* proceeds to deal with licensing, and the consequences of running an unlicensed massage parlour.

Section 5(1) of the *Act* requires operators to be licensed, and attaches a $10,000 (N.Z.) fine or three months imprisonment to those who are not. Moreover, under section 6(2)(a) any one who has been convicted of a prostitution-related offence (brothel keeping, living on the earnings, procuring or soliciting), a drug offence, or who has had a licence revoked within the preceding five years, may not apply for a licence.

Under section 8, qualification for a licence must be made to Magistrate's Court; section 11 provides that the Magistrate must satisfy himself that the applicator "is a proper person to carry on the business of operating a massage parlour". No guidelines have been issued to assist this screening process.

For a massage parlour to operate within the law, it must be in the effective control of an approved licensee; masseurs and masseuses must be 18 years of age or more, and not convicted of any of the offences mentioned in section 6(2)(a). A complaint against a licensee can be filed by the police or any other person. Under section 27 a court has power to cancel or suspend the licence, impose a fine or order termination of employment or dismiss the complaint, if improper.

The grounds for cancellation of a licence include: (a) conviction of the licensee or his manager of an offence under section 6(2)(a); (b) a second conviction under the *Massage Parlours Act*; (c) conviction of any offence leading to a conclusion that the licensee is not a proper person to run such an establishment; (d) failure of adequate supervision of masseurs and masseuses resulting in their conviction of a prostitution-related offence or performing acts of prostitution. The court may order the dismissal of an operative who performs acts of prostitution during the course of his or her employment, or who by reason of conviction for any offence is deemed not to be a proper person for such employment (section 32).

Appeal provisions are set out in section 33, which provides a right of appeal against adverse decisions on licences and continued employment to the Supreme Court. Sections 34-39 outline the powers and duties of the police under the *Act*. They are authorized to enter and inspect the licensed premises at any time.

Footnotes

[1] *Sexual Offences Act* 4.5 Eliz. II, 1956, c. 69, ss. 13, 32.

[2] *Ibid.*, ss. 33-35. Furthermore by s. 36 it is an offence "for the tenant or occupier of any premises to be used for the purposes of habitual prostitution".

[3] Home Office, Criminal Law Revision Committee, Working Paper on Offences relating to Prostitution and Allied Offences, H.M.S.O. London, 1982, at 20.

[4] *Sexual Offences Act*, ss. 22, 23.

[5] *Ibid.*, s. 30.

[6] Working Paper on Offences relating to Prostitution, at 30-3 and see Criminal Law Revision Committee, 16th Report, *Prostitution in the Streets*, 1984 Cmnd. 9329, H.M.S.O. London, at 8-9.

[7] *Ibid.*

[8] There is, however, some evidence of concern at the local level, see London Borough of Camden Policy and Resources (Police Sub-Committee), Report on Research Regarding the Establishment of a Specialist Unit to Co-ordinate Services to Prostitute Women, May 31, 1984.

[9] For the recommendation on brothels, see Working Paper on Offences relating to Prostitution at 19-25.

[10] *Ibid.*, at 9-17.

[11] For the recommendation on street prostitution, see Working Paper on Offences relating to Prostitution, and *Prostitution in the Streets.*

[12] *Report of the Committee on Homosexual Offences and Prostitution*, 1957, Cmnd. 247, H.M.S.O., London.

[13] The structure and substance of the Tasmanian *Criminal Code* is similar to that in Queensland and Western Australia. The Australia Capital Territory (Canberra) is governed largely by the law of New South Wales and the criminal law of the Northern Territory is modelled on that of South Australia.

[14] *Criminal Code*, Stat. Queensland 1899, 63 Vic. No. 9, s. 211; *Criminal Code*, Stat. W.A. 1902, No. 14, s. 184.

[15] *Vagrants, Gaming and Other Offences Act*, Stat. Queensland 1931-78, s. 5(1); *Police Act*, Stat. W.A. 1892, No. 27, s. 59.

[16] *Vagrants, Gaming and Other Offences Act*, *Ibid.*, s. 5(1)(b); *Police Act*, *Ibid.*, s. 59.

[17] *Vagrants, Gaming and Other Offences Act*, *Ibid.*, s. 5(1)(c), 55(iv).

[18] *Police Act*, Stat. W.A. 1892, ss. 769(1), 66.

[19] *Vagrants, Gaming and Other Offences Act*, Stat. Queensland 1931-78, s. 8(1)(a); *Police Act*, Stat. W.A. 1892, s. 76 F.

[20] *Vagrants, Gaming and Other Offences Act*, *Ibid.*, s. 8(3).

[21] *Ibid.*, s. 10.

[22] *Vagrants, Gaming and Other Offences Act*, Stat. Queensland 1971, No. 69, s. 8 A.

[23] *The Criminal Code* (Queensland), s. 231, 235; *The Criminal Code* (W.A.), s. 191.

[24] *The Criminal Code* (Queensland), s. 231; *The Criminal Code* (W.A.), s. 194(3).

[25] *The Police Offences Act*, Stat. S.A., 1953, No. 55, s. 25.

[26] *Ibid.*, s. 73.

[27] *Ibid.*, s. 26.

[28] *Ibid.*, s. 28.

[29] *Ibid.*, ss. 27, 28, 30.

[30] *Ibid.*, ss. 29, 31.

[31] *Radak* v. *Daire* (1982) 30 S.A.S.R. 60 (S.C.).

[32] *Criminal Law Consolidation Act*, 1935-75, s. 64.

[33] *The Police Offences Act*, Stat. S.A., 1953, s. 13, 21.

[34] *Report of the Select Committee of Inquiry into Prostitution*, South Australia, 1980.

[35] *The Offences in Public Places Act*, Stat. N.S.W. 1979, No. 63, s. 5.

[36] *The Prostitution Act*, Stat. N.S.W., 1979, No. 71, as amended 1983, No. 12, s. 8 A.

[37] *The Offences in Public Place (Amendment) Act*, Stat. N.S.W., 1983, s. 5(2).

[38] *The Prostitution Act*, Stat. N.S.W., 1979, s. 8.

[39] See *In re Applications of Shepherd*, [1983] 1 N.S.W.L.R. 96 (S.C.).

[40] *The Disorderly Houses Act*, Stat. N.S.W. 1943, No. 39, s. 10.

[41] *The Crimes Act*, Stat. N.S.W. 1900, s. 91.

[42] *The Summary Offences Act*, Stat. Vict. 1966, No. 7405, as amended by the *Crimes (Social Offences) Act*, Stat. Vict. 1980, No. 9509, s. 18.

[43] *Ibid.*, s. 18(b).

[44] *The Vagrancy Act*, Stat. Vict. 1966, No. 7393, s. 10.

[45] *Ibid.*

[46] *The Planning (Brothels) Act*, Stat. Vict. 1984, No. 10094.

[47] See Report by Working Party to the Minister of Planning of Environment on Location of Massage Parlours, Oct. 1983, Melbourne, Victoria.

[48] *The Town and Country Planning Act*, Stat. Vict. 1961, No. 6849.

[49] *The Planning (Brothels) Act*, Stat. Vict. 1984, s. 3.

[50] Guidelines on the Location of Brothels, May, 1984, Ministry for Planning and the Environment, Melbourne, Victoria.

[51] See *The Vagrancy Act*, Stat. Vict. 1966, s. 11. See also s. 12.

[52] See amendments to the *Vagrancy Act*, *Ibid.*, s. 10.

[53] *The Summary Offences Act*, Stat. Vict. 1966, s. 18, 18A.

[54] *The Crimes Act*, Stat. Vict. 1958, No. 6231, s. 61.

[55] *Ibid.*, s. 59.

[56] *R. v. Pikos*, [1967] V.R. 89 (S.C.).

[57] Terms of Reference, "Inquiry into Prostitution", Melbourne, Victoria, September, 1984.

[58] *Summary Offences Act* 1981, Stat. N.Z. 113, s. 26.

[59] See Part III, Section II, Chapter 34.

[60] *Sexual Offence Act* 4 & 5 Eliz. II, 1956, c. 69.

[61] *The Crimes Act* 1961 Stat. N.Z. 43, s. 148.

[62] *Ibid.* s. 149.

[63] 48 & 49 Vict., c. 69.

[64] *The Crimes Act* 1961, Stat. N.Z. 43, s. 147(2).

[65] See *R.* v. *Robinson*, [1978] 1 N.Z.L.R. 709.

[66] *The Crimes Act*, 1961 Stat. N.Z., s. 146.

[67] *The Massage Parlours Act* 1978, Stat. N.Z. 13.

Chapter 37

Continental European Countries

The five countries which were researched for the Committee, France, West Germany, Denmark, The Netherlands and Sweden, present a wide range of legal responses to prostitution. At one end of the spectrum is France which has a series of criminal provisions which would be familiar to a Canadian lawyer. At the other is Denmark which, despite a small number of residual criminal provisions, in reality practises decriminalization. Between those poles are Sweden, which until recently at least, had similarities with Denmark but has now moved towards wider proscription, and Germany and The Netherlands which employ a mixture of criminal law and regulation. With the possible exception of France where there seems to be a gap between public opinion and government policy on the legal control of prostitution, the current law is a fairly faithful reflection of public sentiment in each country.[1]

1. France

Until 1946, legalized prostitution existed in France in the sense that brothels ("maisons de la tolérance") were permitted and both they and their inmates subject to regulation. With the abolition of that regime, the substance of the law has developed in a way which approximates the current state of Canadian law.[2]

The *Penal Code* contains a separate offence of "running" or permitting the use of premises which are accessible to or used by the public, for purposes of prostitution. In the case of a conviction for "running", the judge has the power to order closure, revoke the licence or confiscate the assets of the establishment. Furthermore, if a landlord refuses to take action against a tenant convicted of running such an establishment, a judge has the power to terminate the lease.[3]

The *Code* in section 334 also sets out a list of offences relating to procuring and pimping. In addition to those offences which would be familiar to us, the French include: (a) knowingly cohabiting with an habitual prostitute; (b) maintaining a personal relationship with one or more prostitutes and a lifestyle which is out of proportion to personal income; (c) interfering by threats, pressure, ruses etc. with associations working for the reform of prostitutes and the prevention of prostitution. By section 334(1) a series of special circumstances, including the youth of the partner, the use of violence or threats, the carrying of a weapon, a familiar relationship with the partner, and the offender's public position, are considered to be aggravating factors. In the cases of running a brothel, procuring or pimping, the judge also has the power to curtail temporarily the convicted person's civil liberties, for example, the individual's right to vote, as well as to confiscate the profits from prostitution.[4]

It is an offence punishable by a fine for a person to solicit "by means of gestures, words, texts, or by any other means" in a public place in France. By judicial interpretation this has been construed as meaning merely loitering and repeatedly "looking at" passersby.[5]

The *Penal Code* provisions are considered exclusive, in the sense that municipalities may not impose proscriptions on prostitution.

After complaints in 1975 that law enforcement in the area of prostitution was lax, law enforcement authorities stepped up their efforts. Predictably the greatest increase in prosecutions has been for soliciting, a fact which led to a dramatic protest by prostitutes in Paris that same year. Notwithstanding that outburst of sentiment, enforcement in the area of street soliciting remains vigorous. Legislative machinery for the establishment of homes for former prostitutes does exist. However, only a small number of *départements* (counties) have set up such establishments. Since 1975, societies for the aid of prostitutes have been allowed to act as civil claimants in criminal trials for procuring, to demand compensation for the outlay required to assist former prostitutes. Apparently such compensation has been paid, but does not cumulatively cover the expenses actually incurred by the societies.

A public opinion poll conducted in 1978 in France showed that 71% of the population was opposed to the prohibition of prostitution; 50% were in favour of decriminalizing brothels, and 59% considered prostitution a social necessity. Despite this significant degree of doubt about the desirability of the present legal regime, successive governments have chosen to sustain it. The present French government has, however, committed itself to improving the capacity of the police to pursue procurers more effectively.

Recently an inter-departmental committee of the French government reported in favour of decriminalizing the activities of prostitutes, as far as possible, specifically suggesting review of the law on soliciting and living with an habitual prostitute. The committee also favours special education programs for former prostitutes to facilitate their social reintegration.

In 1983, a number of prostitutes organized to secure recognition of prostitution as a normal form of labour, with the same entitlements as other jobs. This organization has not found a sympathetic ear in government, although it is clear that the policies of the tax collector towards prostitutes has mellowed somewhat in the intervening period.

2. West Germany

The West German law on prostitution combines both criminal law proscription, which applies at the federal level and is aimed at the exploitative and commercial elements of prostitution, and by-laws which are enacted under the authority of the states. The by-laws combine both regulatory and proscriptive elements and are directed at its nuisance effects.[6]

The current German *Penal Code* dates from 1973. In introducing the *Code*, the government of the day indicated that the prostitution provisions were not directed to moral harm done by the encouragement of extra-marital relationships but designed to protect the young and the prostitutes themselves. In fact, the provisions reflect this policy choice.

Section 180 of the *Penal Code* makes it an offence to procure for purposes of prostitution a person under the age of 18 years. The section further prohibits the inducing of a person under 21 years to engage in or continue in prostitution. Both offences carry with them the penalty of imprisonment.

Under section 180(a) a person who runs an establishment in which others prostitute themselves is liable to imprisonment for "procuring" if:

(a) the prostitutes are kept in a position of economic or personal dependency;

(b) prostitution is furthered by anything more than the simple provision of rooms;

(c) the prostitutes are provided with lodgings, urged to prostitute or are exploited financially for that purpose;

(d) prostitutes are actively recruited; or

(e) prostitutes under 18 are provided with any sort of facilities.

As the mere provision of rooms to prostitutes is not caught by this section it has been possible for local authorities to authorize or set up so-called "eros centres", (usually apartment blocks with rooms which are rented to prostitutes for reception of customers). The courts have held that the owners or managers of these centres do not fall afoul of the law as long as they provide only basic facilities. Those who run "call girl" agencies, on the other hand, have been convicted under this section.

Pimping is also subject to the federal law. Section 181(a) of the *Code* prescribes imprisonment for anyone who engages in "exploitative pimping". This latter term embraces the elements of exploitation; supervision for financial gain; inducing continuation of a prostitute in the profession; and, arranging contact with clients. The operators of prostitution establishments have been convicted under this section for making introductions. The regular receipt of money, even in large sums, does not by itself constitute "exploitative pimping". There must have been some element of "undue influence" by the accused.

Furthermore, merely providing protection to a prostitute does not amount to "supervision" under this section, unless there is also control of payments to the prostitute.

Section 181 of the *Code* also makes it an offence liable to imprisonment to traffic in human persons. This includes the use of force, threat or ruse to induce someone to be a prostitute, and recruiting or abducting someone from a foreign country to perform sexual acts by exploiting that person's vulnerability.

The *Code* penalizes the conduct of prostitutes themselves in only two instances: for repeated violation of local by-laws prohibiting soliciting and for soliciting for clients in the vicinity of schools or other places frequented by young people.

The states have the power under the *Code* to pass by-laws prohibiting prostitution in parts of towns and between certain hours in order to protect the young and public decency. If a by-law is enacted, at least one area must be exempted.

All states, with the exception of West Berlin, have such by-laws designed to control street prostitution. In the state of Hamburg, for instance, the by-law for the City of Hamburg limits public solicitation in the "prostitution areas" to certain hours, except for one area in which it is allowed all day. In the latter, the streets are blocked off and young people and non-prostitute females are not allowed in that area.

Tied in with the by-laws is the power which the states are given under the federal *Law on the Repression of Venereal Diseases*, to demand that prostitutes register themselves and appear for regular medical check-ups. All the states have such regimes. In Hamburg, for instance, all prostitutes are required to register themselves at the office of the central health inspector and to visit the office for a weekly medical examination.

As in the other countries examined, prostitution in West Germany manifests itself in a variety of forms and settings, the street, bars, windows, sex clubs and private premises. The police in the City of Hamburg report that most prostitutes, especially the younger ones, have a relationship with a pimp. The main distinguishing feature in the German situation is the existence of state-approved centres for prostitution. The rental cost in these centres is such that only those with numerous clients can afford them. Advertising in local papers by prostitutes using their apartments or hotels is widely employed. According to police reports, juvenile prostitution is on the increase and there has been a growth in the number of sex clubs outside the official "red light areas". It is also the case that unregistered prostitutes tend to outnumber those who are registered.

Enforcement under the dual regime of criminal law and regulation presents problems as it does in other countries. Enforcement is particularly vigorous and reasonably effective in the approved prostitution areas, and in the neighbourhood of "eros centres". However, as street prostitution usually transcends geographic boundaries, the police do not claim to have entirely contained that particular problem. Investigation of procuring and pimping offences is extremely difficult because prostitutes rarely agree to testify. Even when they do file complaints, prosecution may fail for lack of adequate evidence. It is hoped that newly established police details specializing in organized crime and undercover work will improve enforcement possibilities in this area.

Penalties for prostitution-related offences appear somewhat lenient by Canadian standards. In particular, for the offences which draw imprisonment, i.e., trafficking or exploitative pimping, the average term is one year.

Debate on the law relating to prostitution has been engendered by the women's movement which rejects all repressive measures against prostitutes. In their opinion, the latter result in the victimization of prostitutes without dealing with the root causes of the problem. In the state of Hamburg, the Bureau for the Emancipation of Women established by the state Senate, has urged the repeal of all by-laws prohibiting street soliciting. Moreover the Bureau has criticized the state approval of "red light" areas, because this makes it easier for pimps and landlords to exploit the prostitutes, and has objected to the discriminatory regulations concerning medical examinations. There are signs that this feature of the regulatory system will be dropped in the near future.

3. Denmark

The law relating to prostitution in Denmark, like the law relating to sexual offences in general, has been significantly relaxed in recent decades. This has occurred exclusively through changes in enforcement practice.[7]

The law on prostitution combines both criminal proscription through the *Penal Code* and local police regulation. Two *Penal Code* provisions which were formerly used to penalize prostitutes and their sponsors, the offence of leading "a life of idleness", i.e. not pursuing a lawful occupation, (section 199), and encouraging or inviting indecency or displaying an immoral mode of living, (section 233), are no longer utilized.

Promoting and commercially exploiting prostitution are specifically addressed in the *Code*. By virtue of sections 228 and 229 a wide variety of offences relating to pimping, procuring, keeping a brothel, etc., are punishable. Pimping embraces both actively controlling and passively "living on the avails." Moreover, the provisions are broad enough to catch the man sharing an apartment with a prostitute and the hotel owner or landlord who rents facilities to prostitutes at excessive rents. Apart from those offences which assume a heterosexual relationship, homosexual prostitution is governed by the same provisions.

At the local level, the *Code* provisions are complemented by police regulations which proscribe offensive modes of soliciting. Street prostitution exists in Denmark and is most evident in Copenhagen and other major cities. Window soliciting and large-scale brothels are practically unknown. Private activity seems to revolve around small-scale massage parlours, escort services and call girl operations. Visible sex clubs and saunas are rare. An increase in the number of drug-addicted girls operating as street prostitutes has been noted in the past 15 years, although the Copenhagen police feel the problem is now contained.

As indicated above, sections 199 and 233 are not now enforced. The demise of the former is associated with an increase in unemployment and the fact that social aid is considered a legal source of income. Street soliciting rarely attracts police action, except where it is practised in unusual places. By tradition, street soliciting in Denmark is confined to very small and well defined areas of the cities and towns and there is rarely cause for interference. The police do, of course, intervene when other forms of criminal activity occur.

Enforcement against those involved in the commercialization and exploitation of prostitution has declined considerably since the early 1970s. The average annual figure for convictions for all such offences is 25. The low figure is explained in part by the abolition of the Copenhagan police vice squad in 1971, and by a perceptible decrease in the incidence of exploitative pimping. Although pimping was very prevalent in Denmark in the 1950s and 1960s, prostitutes have become more independent in recent decades. The suggestion is made that decreasing criminality in practice has reduced the need for pimps. Where there is a relationship between a prostitute and a man who is sustained by her, it is, in most cases, voluntary. It is thought that the majority of Danish prostitutes are economically independent, even though they may live with and sustain a husband or "fiancée". It is also perceived that prostitution in Denmark is becoming increasingly "deprofessionalized" in the sense that more and more individuals are working part time.

Prostitution by minors is treated with greater concern, especially where the young person is under 15 or the practice is related to drug dependency. Street level guidance clinics exist in affected neighbourhoods, and both public and private agencies offer assistance. Notwithstanding these strategies, the problem continues to exist and drug dependent juvenile prostitutes remain the most miserable and visible reminder that more needs to be done.

At the level of public opinion, the women's movement in Denmark, as in other countries, has opened up debate on prostitution. However, unlike the debate in Sweden and Norway in which most feminists seem to be in agreement, there is a division of opinion in Denmark. Those who deplore prostitution by and large do not favour more repressive laws even for exploiters or customers (the latter being seen as the victims of closed sexual attitudes), but advocate vigorous social strategies and educational programs to combat prostitution.

Ranged against them is a more radical group, including prostitutes, who see prostitution as a legitimate occupation and entitled to legal and social approval and protection like any other. The latter have organized pro-prostitution groups to further the interests of prostitutes and to challenge the view of anti-prostitution feminists. Despite two reports advocating the liberalization of the prostitution laws, successive Danish governments have eschewed amending or repealing the laws, preferring to minimize their impact in practice.

4. The Netherlands

As in West Germany, there is a dual regime of criminal law proscription and local regulation, although in Holland, it seems there has been significant pressure for prostitution to be dealt with exclusively at the local level.[8]

Since 1911, the Dutch *Penal Code* has contained provisions which penalize the procuring of minors (section 250), habitual or occupational procuration (section 250(2)) and trafficking in women or minors of either sex (section 250(3)). Recently the Dutch Minister of Justice announced his intention to repeal section 250(2). There is also a provision which proscribes "living on the avails" (section 423.2). The Minister of Justice has proposed amending this section of the *Code*, narrowing it to catch only those pimps who by force or threat of it induce prostitutes to share the profits of the business with them.

Municipalities in Holland have the power to and do regulate commercialized prostitution by zoning and licensing regulations. Moreover they use so-called "police regulations" to prohibit the owners and tenants of premises from allowing their property to be used for the purpose of prostitution. Interestingly, in light of the Canadian experience with attempts to control prostitution at the local level, these regulations have been upheld by the High Court, because they have as their purpose the preservation of public order, an objective which is not encompassed by the national criminal law.

Police regulations are also employed to prohibit loitering, standing or sitting in or at a public place, and in some cities have been framed to penalize customers as well. In many cities, however, certain streets or areas are expressly exempted from the operation of the soliciting by-laws. In Amsterdam, the Mayor has the power to issue a list of exempt streets. The High Court has also upheld the constitutionality of the soliciting regulations.

In the area of health regulation, some local authorities provide special clinics for prostitutes, but prostitutes are not obliged to use them.

Prostitution is reported to be fairly widespread in cities and towns in Holland, although the Mayors indicate that the sex industry has not grown in recent years. Male prostitution is most noticeable in the larger cities. It has been noted by authoritative sources that pimping is less prevalent than it used to be. However, increases are reported in the number of prostitutes employed by sex clubs and in the incidence of drug addiction.

On the enforcement side it seems that the authorities have effectively given up prosecuting under the *Penal Code*, except in the case of the procuring of minors. Enforcement is pressed more vigorously at the local level, although on an admittedly selective basis. The objective is, apparently, the stringent enforcement of bawdy house and street or window soliciting regulations outside the exempted areas. Within the exempted areas, the police do not intrude even in commercialized establishments, unless there is evidence of under-age prostitution, prostitution by foreigners, other criminal activity, blatant exhibitionism or expansionism. There is evidence, too, of co-operation between some city governments and the owners of sex clubs to improve the physical condition of exempted areas.

Although prostitution has not been the subject of public opinion sampling in Holland, the community seems to accept the current permissive policy of selective control. There are, as one would expect, complaints from particular communities of the adverse nuisance effects, especially from street and window prostitution. However, municipalities are often willing to respond to complaints by stiffening regulations or their enforcement, and even by offering financial support to disturbed residents who wish to relocate. Rotterdam has been attempting, to date without success, to relocate its "red light" area.

Women's rights groups have also been active in Holland in recent years. They have argued that high priority be given to the prevention of exploitative and coercive forms of prostitution, and that prostitutes enjoy the same legal and social protections afforded to other workers. Some feminist writers have advocated the establishment of commercial sex businesses operated by collectives of prostitutes. They, along with the Mayors of both Rotterdam and Amsterdam, have pressed for the repeal of the adult procuring provision in the *Penal Code* to allow for more local initiative. As indicated above, the government seems to have taken up these proposals.

5. Sweden

Sweden handles prostitution as a matter of law exclusively through its *Penal Code*. However, its ambit is confined to the exploitative elements of prostitution. Sweden is, moreover, one of the few countries which have attempted to deal with prostitution by other social mechanisms, in particular by educational strategies.[9]

The criminal law in Sweden confines its attention in the area of prostitution to procuring, living on the avails and the operation of bawdy houses. Under chapter 6, section 7 of the *Penal Code* it is an offence habitually for personal gain to encourage or exploit another's immoral mode of life, or to induce one under 21 years into such a life. The gravity of the crime and thus the penalty (imprisonment) are increased if the exploitation is widespread or ruthless. "Immoral mode of life" typically embraces more or less occupational female and male prostitution. The encouragement can take place in a variety of contexts, including the operation of a brothel or supplying the prostitutes with the names of clients. Exploitation covers the activities of pimps but also of the landlords who charge exorbitant rents to prostitutes. A lesser penalty is exacted under the same provision for encouraging temporary sexual relations between others.

By virtue of chapter 16, section 8 of the *Code*, a person who obtains or attempts to obtain sexual services from an individual under 18 years is guilty of the seduction of a youth.

The *Real Property Code*, chapter 12 section 42, provides that rent is forfeited and the landlord is entitled to cancel the lease where rented premises are being used for criminal activities. The drafters apparently considered that this extended to premises used for prostitution.

There are no provisions either in the *Code* or at the local level which proscribe soliciting. According to the Committee on Prostitution set up by the Swedish Parliament (Riksdag) which reported in 1981, prostitution has been decreasing in Sweden in recent years, both on the streets and behind closed doors. It is suggested that this decline reflects a general heightening of the social conscience and debate on prostitution, and the more regular intervention of social welfare authorities.

Despite this trend, prostitution is still a major social problem and a visible one in the largest cities. A very small percentage of prostitutes in Sweden are under 18 and homosexual prostitution is a relatively minor problem. At an institutional level, massage parlours and sex clubs providing sexual services exist in some of the major cities. However, with the enactment of a new and restrictive law on live shows in 1982, the number of sex clubs has declined significantly. It is reported that the majority of female prostitutes come from difficult social backgrounds; for example, about 50% of street prostitutes have criminal records. The proportion of drug users seems to vary greatly from locality to locality.

The police enforce the law as effectively as they can, although the absence of a soliciting offence may make the figures appear modest. For the period 1974-1982 convictions for procuring were approximately 30 per year.

At the level of social policy, steps have been taken, especially in Stockholm and Malmo, by both public authorities and social workers to reduce prostitution. After an extensive study by the Committee on Prostitution of Parliament, the Swedish Government introduced legislation in 1981 which included various measures to prevent prostitution.

A central principle of the legislation is that prostitution should not be accepted as a social given and that efforts in many fields are needed to counteract it. More particularly, the society should be able to offer the necessary social and economic security to people to obviate the need to take up prostitution. Furthermore, it is considered essential to provide open and objective education about sexual matters both in school and later in life. It is apparent, therefore, that the statute commits various authorities and organizations to attempt to reduce the causes of and the need for prostitution.

The legislation which became effective in 1982 obliges the Swedish government to fund research on methods of preventing prostitution, and on ways and means of increasing the awareness of both potential customers and young girls of the undesirability of encouraging or engaging in prostitution.[10]

An even more recent statute has been introduced which attempts to reform the law relating to prostitution.[11] The legislation takes up the recommendations of the Committee on Sexual Offences, a parliamentary committee on which the Swedish women's movement is strongly represented. In reviewing the penal provisions relating to prostitution, the committee took as an underlying principle that the purpose of the law should be to penalize all those who are involved in the commercialization of prostitution and the exploitation of prostitutes.

The committee did not, however, advocate stricter laws against customers on the basis that this would tend to drive prostitution underground, thus hampering attempts to help those practising prostitution. The committee did recommend extending liability for those promoting or exploiting another person's prostitution, by removing the requirement of habitual conduct, by adding the offence of financial exploitation, and by penalizing enticing anyone, of whatever age, into prostitution. The committee further recommended that a landlord should be criminally liable for procuring if he allows another to practise prostitution on premises which he owns. This is designed to allow for the prosecution of the owners of brothels and sex clubs, in particular.

Footnotes

[1] This chapter draws upon a study commissioned for the Committee by the Department of Justice. See J. Kiedrowski and J. van Dijk, ***Pornography and Prostitution in Denmark, France, West Germany, the Netherlands and Sweden*** W.P.P.P.#1.

[2] *Ibid.*, 39-51.

[3] *Code Pénal*, 1982-3, Paris: Dalloz, s. 335(6)

[4] *Ibid.*, s. 335(1)(3)

[5] Cour de Cassation, Crim. 28, Nov. 1962.

[6] Kiedrowski and van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden* W.P.P.P.#1, at 63-74.

[7] *Ibid.*, at 17-27.

[8] *Ibid.*, 86-96.

[9] *Ibid.*, 107-119.

[10] Government Bill concerning *Certain Measures Against Prostitution*, 1981-82.

[11] Government Bill concerning *Amendments in the Penal Code (Sex Offences)*, 1983-84.

Chapter 38

Conclusions

The drawing of any firm conclusions from this comparative survey has to be approached with caution. The data are not drawn from the work of a single researcher or research group, so there are differences in methodology which may belie too many assertions about what seems to work and what does not. Moreover, it is also important to be sensitive to the social and cultural differences between countries reflected in different approaches to prostitution, which may make generalizations difficult.

That having been said, some tentative conclusions may be hazarded. In the first place, it seems clear that law by itself enjoys no special claim to be a solution to prostitution within society. Indeed, it seems that those countries, the majority, which have ignored the importance of non-legal, social responses to prostitution have experienced less success in controlling prostitution than those, such as Sweden, Denmark and Holland, which have recognized the value of social strategies in changing attitudes and responding to the human problems associated with prostitution. There is at least the impression that while those countries who use legal mechanisms, especially the criminal law, to deal with prostitution merely chase an ever elusive and growing problem, the states in which at least tentative steps have been taken to try to understand and deal with the causes of prostitution as a social phenomenom, are making some headway. At least they appear to be containing it. In the case of Sweden there is evidence that the employment of social and educational strategies is actually reducing the incidence of prostitution.

Secondly, the survey suggests that there is no necessary correlation between the existence of harsh criminal law provisions and effective control of prostitution. It may be a truism that a legal regime is no better than the level of will and ability to enforce it, but it is a truism which escapes many people including some law enforcement authorities.

The United States which has overall the most draconian provisions on prostitution, with the possible exception of Queensland and Western Australia, has a very uneven record when it comes to effective control of prostitution through the criminal law. In the larger cities on the one hand, the application of the criminal law in most instances is a "will o'the wisp" enterprise which achieves little more than harassment of the prostitutes. On the other hand, in smaller centres, vigorous enforcement and thus effectiveness of the law seems to have had its effect of ridding communities of at least the public manifestations of prostitution. This process is no doubt also assisted in the smaller communities by other factors such as lack of anonymity, and non-legal social pressures.

This variable pattern of enforcement and thus effectiveness of the law seems to be replicated in France, England and Wales, Canada, New Zealand and Australia all of which have emphasized criminal law proscriptions in addressing prostitution.

Thirdly, there is little evidence that decriminalization necessarily results in an increase in prostitution and related criminality. Although the informal Canadian and legislated New South Wales experiences with street prostitution point in that direction, it is not supported by the evidence from The Netherlands and Denmark where the figures for prostitution seem to be stable.

This difference in experience has to be put into context. Comparing the rather piecemeal approach in Canada and New South Wales with the more integrated and extensive decriminalization in the European countries suggests that the impact of decriminalization depends on whether it is a random or planned process. In particular it seems to make a considerable difference in terms of results whether a move to decriminalization is balanced by the replacement of the criminal law with some form of regulation. Despite the romantic notion entertained in some quarters that all will be well with the world of prostitution if only the criminal law is removed, the practical truth, it seems, is that it will not. All of the opportunities for damage, abuse and exploitation remain.

The study suggests that if prostitution is removed from the reach of the criminal law, it will have to some extent to be regulated as any other business, indeed as a particularly risky business, if there is any hope of neutralising the inherent risks to the participant, and of obviating the concern, and indeed harm, it causes to members of the public.

The survey suggests that in what is an imperfect world the most satisfactory short term solution to the problem of prostitution has been achieved in those countries in which, like Denmark, prostitution is operated as a regulated business, or which like The Netherlands, mix selective application of the criminal law with regulation of the trade in defined geographic locations. Of particular note is the fact that in both countries there are reports that with the removal of the threat of criminal prosecution from the prostitutes and acceptance of the regulation of prostitution as a business, the influence of pimps, at least of the odious, exploitative variety has decreased. The reason: prostitutes have found it possible to operate individually without the need of a "protector" and in some instances to organize themselves on a small business basis free from commercial exploitation by others.

Although, with the notorious exception of Nevada, the regulatory approach has not attracted significant attention or support in common law jurisdictions, it is worth noting that one Australian state, after considerable discussion, has decided to permit the establishment of regulated brothels, in a way which utilizes existing regulatory structures for land use and which is designed to suit its demographic realities.

The survey, it must be said, does reveal that decriminalization and regulation can present special problems which are as troubling as those which obtain in criminal law regimes. Nothing in the research survey suggests that either the West German or the Nevada regulatory approaches to prostitution merit emulation. In the former, the combination of state approved prostitution apartment blocks and the regimented registration of prostitutes for public health purposes is unappealing. In Nevada there is ample evidence that the "regulation" applied to the running of prostitution ranches at worst borders on bondage and at best involves serious infringements of the civil liberties of those working there. Furthermore, control is reposed at the local level, where the opportunities for venality may be greatest.

The material in the survey suggests that any system of regulation which might replace or coexist with criminal proscription requires both considerable study and careful development. A move in this direction is only likely to be both legitimate and successful if it reflects a genuine attempt to balance all of the interests involved: that of the community in protecting itself from offensive or intrusive conduct; that of the prostitutes and customers in having a safe and healthy environment in which to conduct their liaisons; and that of the state in preserving legality and public order.

Finally, it is clear from the survey that it is crucial to any planned and reasoned approach to prostitution that both the political will and resources be applied which will allow a combination of long term social engineering and short term legal control mechanisms to work. So far, the only country of those surveyed which has given formal recognition to this reality and developed a national commitment is Sweden.

Section IV

Recommendations on Prostitution

Summary

Section IV contains the Committee's recommendations on prostitution. In Chapter 39, an analysis is made of the results of a National Population Study on Pornography and Prostitution conducted for the Committee, as well as of the various options suggested to the Committee in briefs and oral representations. Chapter 40 sets out the specific recommendations and the rationales of the Committee.

Chapter 39

The Range and Character of Suggested Options

During its hearings and through briefs and representations made to it, the Committee heard and considered a wide range of views as to what should be done about the phenomenon of prostitution in Canadian society. We think that it is important to set out the various suggestions that were put to us and the strengths and weaknesses of each as a prelude to elaborating our own recommendations and the rationales for them.

1. The Lack of Consensus

It should be made clear at the outset that there is little evidence of a broad social consensus in Canada on prostitution and what should be done about it. Whatever may have been the situation in the past, when a consensus may have existed, in today's pluralist climate opinion on the matter reflects the diversity of social values and moral perception which we observe and hear around us.

The existence of a significant divergence of opinion is seen quite clearly in the National Population Study on Pornography and Prostitution conducted for the Committee during 1984 which involved a canvass of 2,018 Canadian men and women over the age of 18.[1] The results of the survey are questionable to some extent in that respondents were required to answer multiple questions without necessarily reflecting carefully on the consistency of their answers to them. However, the figures do at least give the impression that opinion is close to evenly divided on what, if anything, should be done about prostitution.

The figures from the survey show that Canadians by a two to one majority (62% against 35%), consider the exchange of sexual services for money unacceptable. Moreover, wide ratios are evident in relation to the perceived harms flowing from prostitution: organized crime (60% to 11%); violence (59% to 16%); venereal disease (69% to 20%); adverse effects on property values (62% to 16%). The ratio diminishes, however, to 53% compared with 42% where the sexual exchange is for something other than money. Moreover, when asked whether they were offended by soliciting by a prostitute and by men looking for a prostitute, a more modest majority (52% to 42% and 56% to 36% respectively) agreed that they found such conduct offensive.

When the figures relating to the acceptability of certain types of prostitution activities and suggestions as to what role the state should play in dealing with prostitution are considered, the lack of a consensus is accentuated. Although only 11% as opposed to 84% found street prostitution acceptable, and 28% as opposed to 67% considered designated "red light" areas acceptable, the ratio shrank to 38% to 55% in the case of brothels, to 45% to 52% in the case of "prostitution in private", and 43% to 52% in the case of escort and call girl services.

The figures relating to strategies reveal that 62% as compared with 29% of the respondents favour toughening the law against prostitutes, and 71% to 6% giving increased power to the police to control prostitution. However, as many as 40% as opposed to 47% said that they favoured decriminalization of prostitution-related activities, and significant numbers favoured the use of various regulatory expedients to control prostitution, for example zoning (61%), and licensing prostitutes (63%). A majority felt that the government should increase social service funding (59% to 33%), and improve social services initiatives in this field (57% to 36%). Despite general support for the adoption of social and one or more legal strategies, a large majority of Canadians evince pessimism over the likelihood of any expedients making a difference. Indeed 92% as compared with 5% felt that prostitution will always exist, no matter what is done to combat it.

These figures suggest that Canadians, by a large margin, consider prostitution to be an unfortunate and undesirable social fact. Moreover, a sizeable majority see it as socially harmful. However, they see it as a social given, and are not sanguine that any expedient to remove it will be successful. Perhaps not surprisingly they are seriously divided and confused when it comes to devising legal strategies to deal with it. Somewhat less doubt is evinced in relation to the desirability of developing social strategies to respond to it.

2. The Briefs and Representations

The briefs and representations which we received fall basically into four categories. First of all, there are those who feel that the way to deal with prostitution is to increase the rigour of the criminal law. The second view, which represents the opposite end of the spectrum, is that prostitution-related activities should, as far as possible, be decriminalized; that is, removed from the embrace of the criminal law, unless they involve other forms of criminal conduct. The third view is that the social reality of prostitution should be recognized and that it should be legalized and subjected to a regulatory form of control. As might be anticipated, there were variations within each of these groupings. Furthermore, there was in some instances overlapping at the edges. In one instance, there was a conscious blending of the criminalization and decriminalization options which represents an additional category.

2.1 Further Criminalization

The view that the criminal law should be stiffened to deal with prostitution varied in both extent and intensity. The most extreme position which was espoused by a very small proportion of those making submissions, mainly representatives of fundamentalist Protestant churches, was that both the act of prostitution and the status of a person as a prostitute should be attacked by the criminal law. This line of thinking depends upon the conviction that the criminal law is a direct and necessary reflection of Christian, or more correctly, Christian Old Testament morality, and that the criminal law must be used as an instrument for restoration of traditional and timeless religious and moral values. The acts of prostitution and being a prostitute are sins against God and therefore crimes against the society.

Although in theory this view has the advantage of removing the present uncertainties in the law and substituting clear and unyielding precepts, it represents a narrow and unforgiving view of both society and human nature. There is no place within it for differences in social and moral opinion and practice which clearly exist in our society, nor for compassion, unless it is tied to a conscious decision on the part of the sinner and wrongdoer to repent. It clearly disregards the right of every individual in Canadian society to be treated with concern for his or her human dignity. Effective enforcement would require the establishment of an extensive and intrusive apparatus of morals police, and thus constant infringements of civil liberties. The failure to set up such an enforcement apparatus would reduce the law to purely symbolic status. While such a statement enshrined in law might provide some solace to those of stern faith who have this rigid view of the world, it would have no relationship to mainstream opinion in the country, and be of no practical value whatever.

Rather more pragmatic reasons exist for the argument, which emanated from a number of sources, that the existing law should be stiffened to make it possible for the police to control street prostitution more effectively and to allow them to secure convictions more easily. This view proceeds from a stated position that, however irksome prostitution in general may be, there is no reason for the law to intrude unless it becomes publicly offensive and harms other citizens. Accordingly, the concern with the law is not what takes place in private, but the public manifestations of prostitution.

This view had two variants. In the first place there were a small number of individuals who live in residential areas affected by street prostitution, especially Vancouver, who felt that the only satisfactory solution to the problem was a return to the "Vag. C." provision of the *Criminal Code* repealed in 1972. This, it will be remembered, allowed the police to arrest and charge women as streetwalkers unable to give a good account of themselves. Although this view was openly espoused by very few presenters, the Committee had at least the impression from some of the comments made by police authorities, and a certain nostalgia for the "good old days", that a return to "Vag. C", or the introduction of a special loitering offence, would meet with the approval of certain segments of the law enforcement community. This view reflects the concern that they should have the least complicated and most effective means of responding to street prostitution.

The second strain of opinion which was widely espoused by the police (representing the official position of the Association of Chiefs of Police), the Mayors and Councils, community and commercial groups and individuals in Vancouver, Toronto, Montréal, Halifax, Niagara Falls and other major cities with residential or commercial areas adversely affected by street prostitution, favoured the adoption of the series of recommendations made by the House of Commons Standing Committee on Justice and Legal Affairs in its 1983 report on street prostitution.[2] Particular emphasis was placed, in these representations, on the addition of a new offence of offering or accepting an offer to engage in prostitution, the application of the law to both prostitute and customer, and the redefinition of "public place" to embrace a motor vehicle in a public place. These changes are seen as necessary to repair the damage done by the Supreme Court of Canada in interpreting section 195.1 as requiring pressing and persistent conduct on the part of the prostitute.

An interesting variant of this approach was that proposed by the brief submitted by the Canadian Advisory Council on the Status of Women which recommended that the new offence recommended by the Standing Committee on Justice and Legal Affairs apply to all solicitations in public places for whatever purpose, rather than being confined to those for prostitution.

There is little doubt that the espousal of either of these two expedients would improve the record of the police in controlling the street prostitution situation. A "Vag. C" or loitering provision would enable them to "clean up" any area where their own priorities or complaints from the public demand it. However, the price to be paid would be reversion to a status offence, in that mere suspicion of being a prostitute in a public place would be sufficient to warrant both charge and conviction. There is nothing to suggest that this would be any more acceptable in our society today than it was in 1972 when the former provision was repealed.[3] Unless there is a move to criminalize prostitution itself, it is difficult to see how it is possible to justify criminalizing the mere fact or suspicion of someone being a prostitute. Moreover, this type of provision is open to the objection that it is quite possible that perfectly innocent parties, for example individuals waiting for their friends in public places, will be caught by it.

The second suggestion is less objectionable in the sense that it requires some evidence of an attempt to enter an agreement to provide or be provided with prostitution services. Moreover, in theory it removes the double standard which has been inherent in the traditional substance of the law. There are, however, difficulties with it. In the first place, its success will depend upon the use by the police of undercover techniques, as they have to have evidence of at least an offer made or accepted, something which it may be difficult and costly to divine by listening devices. There are objections in principle to a system which encourages self-incrimination, especially in an area of activity which is by and large relatively insignificant in its criminality. Secondly, there is the associated reality that the manpower imbalance in police forces between male and female officers is such that it is generally much easier, not to mention more acceptable, for the police to use male, i.e., customer, than female, i.e., prostitute, decoys. Accordingly, while the substance of the law would make no distinction between prostitute and client, there would be a distinct differential in terms of enforcement impact. Thirdly, both this and the previous view fail to recognize the general realities of enforcement of this type of morals provision. The fact that typically police forces are not provided with the resources to enforce prostitution-related offences on other than a random basis and have more important ongoing priorities, suggests that the only consequence of the inclusion of tougher offences in the *Criminal Code* would be to shift the location of the problem rather than to cure it. There is little evidence to suggest that in the days when Vag. C held sway it did any more than to confine street prostitution to those areas where no one would object, or if they did, the objections were not taken seriously. Nothing which the Committee heard or has read suggests that with tougher law of the type recommended, the street prostitution problem will be solved. The most that can be claimed is that it might be better controlled by these strategies.

Although the recommendation of the Canadian Advisory Council on the Status of Women represents a valiant attempt to give the new offence less of a discriminatory flavour, it is unlikely that it would be used in practice for anything else than street prostitution. If that is a correct assumption, the type of provision recommended would be open to all the objections which can be levelled against the narrower formulation.

2.2 Decriminalization

The view that, as far as possible, prostitution-related activities should be removed from the reach of the criminal law, was espoused by a majority of womens' group which took a position on prostitution. They included individual prostitutes, gay rights organizations, groups of and individual social workers, some mainline church groups, civil liberties organizations and a minority of municipal politicians, the most notable being the Mayor of Ottawa, Her Honour Marion Dewar.

Although there were some differences in detail, the representations by these interests advocated the removal of street soliciting from the *Criminal Code*; the repeal of the common bawdy house provisions, or at least their loosening to allow small numbers of prostitutes to work out of their residences; and the use of other *Criminal Code* provisions supplemented by provincial legislation and municipal by-laws, to deal with the nuisances surrounding and associated with street prostitution. In some briefs, too, it was made clear that pimps and procurers should be pursued by-law enforcement authorities with greater purpose.

This view proceeds from the strongly held position that prostitutes are essentially victims of a sexist society who live in a legal twilight zone in which their status is at best uncertain, who are subject to violence from those who use their services or otherwise prey on them, and who are harassed by law enforcement authorities. The observation is made that the law in its present state has not solved the prostitution problem, but rather exacerbated it. Although not condoning prostitution as a way of life, proponents of this view consider that for those adult prostitutes who wish to pursue this lifestyle, they should be able to do so in a way which is consonant with their right to dignity and freedom from exploitation. Moreover, they feel that the removal of legal impediments would provide an opportunity to address the far more important objective of removing the causes of prostitution and providing support systems for both active and reformed prostitutes.

It is difficult to disagree with the critique by those who espouse this view of both the substance and application of the present law and the abject failure of Canadian society to deal imaginatively and humanely with prostitution. There may, however, be problems with the notion that, by sweeping away the provisions in the *Code* specifically relating to prostitution and applying other law, both federal and provincial, adequate control mechanisms will continue to exist. Given the record of both law enforcement authorities and the courts on the applicability of more general *Criminal Code* provisions to prostitution-related problems, there is not too much room for optimism that this complex of provisions will be any more effective than the present law. This would be cold comfort to those who live and work in areas which are adversely affected by street prostitution. The relevant sections could, of course, be amended to focus more clearly on the special context of prostitution activity, but that would hardly amount to a purging of prostitution-related offences from the *Code*. We would merely be substituting one set of prostitution-related offences for another. Similar concerns exist in the case of provincial legislation and municipal by-laws, with the additional complication that the courts, especially the Supreme Court of Canada, have made it clear that any attempt by the provinces or municipalities to enact "criminal law" in this area will be struck down.[4]

There may also be problems with the contention that all that needs to be done is to decriminalize without any concern for the further issue of whether other legal strategies might be needed to control or regulate it. While legitimate concern can be evoked for the lot of prostitutes, it does not necessarily follow that they should enjoy some special immunity from the law which applies to the rest of the population. Although the proponents of this view have great concerns about substituting regulation for proscription, it is difficult to see how some degree of regulation could be avoided, especially where the result of decriminalization would be the creation of possibilities for commercialization of prostitution. There are strong arguments to be made for not only the application of existing legislation and regulations to such establishments, for example labour standards, public health, business licensing and zoning requirements, but also for special provisions which address the special risks inherent in the activity of prostitution.

2.3 Legalization (or Regulation)

The third option put before us was that prostitution should be recognized as a social fact, and that, rather than blinding ourselves to this reality and utilizing totally discredited mechanisms of the criminal law to deal with it, we should legalize and regulate it. This line of thinking which was espoused by and large by individual presenters including a minority of municipal politicians, and one residents' group from Vancouver, was not attended by any common view as to how legalization and regulation might best be achieved. The various suggestions included government licensed brothels; the establishment, by zoning, of "red light" districts; the more indirect expedient of the dispersed location of both street prostitution and common bawdy houses by zoning; the licensing of prostitutes, including those working the streets, and the compulsory medical examination of prostitutes.

Among the advantages seen in this approach were the relative ease of enforcement; the acceptance of prostitution as a business and an improved self image of prostitutes operating such enterprises; an attendant reduction of reliance on pimps and other exploiters; the better maintenance of public health, and increased revenue to municipal government from licence fees.

As should already be apparent from the discussion of provincial and municipal control and regulation of prostitution in Part III, Section II, Chapter 31, certain elements of prostitution as a business are already subject to regulation in some parts of Canada, although this is typically not admitted. All of the suggestions received by the Committee advocating legalization favour the extension of the regulatory approach with more openess as to its purpose. Although the approach has some attractions at an intellectual level, there are both moral and practical difficulties with it. The first objection is that this view assumes that prostitution will always exist. For those who see it as a manifestation of a sexist society, that is definitely not an acceptable option, particularly when it results in the establishment of a legal regime which will reinforce sexist values.

Secondly, there is strong sentiment in some quarters that either government-run or even government-licensed prostitution establishments puts the state into the role of endorser of the activity or even that of pimp. While it may be questioned how far the state commits itself to active approval of an activity by merely licensing it in order to control it, the sentiment mentioned will not be easily quieted without a well developed argument as to why this approach is especially desirable. A third concern flows from the record of the one developed system of licensed prostitution in North America, that in Nevada.[5] The evidence suggests that the prostitution ranches in that State operate with little concern for the civil liberties of the prostitutes, and that venality exists in the administration of the system. Unless Canada was to erect a national system of regulation similar to that relating to gun control and gambling, regulation would be in the hands of the provinces and municipalities. Doubt is voiced in particular over whether municipalities will be able or willing to operate regulatory regimes with the necessary degree of commitment, the requisite resources and an adequate blend of humaneness and propriety. Concern is also expressed about the ability and resolve of municipal government to keep out undesirable elements from control of the business. There is the further worry that, if regulation were to be left to the municipalities, an uneven pattern of control and license would emerge, which could turn some communities into veritable "sex havens". Given interest and commitment at the provincial level and necessary resolve to make regulation work, these problems would not necessarily be insurmountable. However, in a decentralized system of government such as ours they need to be carefully weighed.

The legitimate concern about potential infringement of the civil liberties of prostitutes is accentuated in the case of the suggestion that compulsory medical examination should be applied to prostitutes as part of a system of regulation. There is certainly evidence from jurisdictions in which such regimes have operated that prostitutes have been and certainly feel victimized. Moreover, the suggestion is based on the questionable assumption that prostitutes are a high risk group in terms of communicating sexually transmitted diseases.

2.4 A Combination of Further Criminalization and Decriminalization

Finally, the Committee heard and considered an interesting fourth option which blended the toughening of the criminal law and the decriminalization option. In its most developed form, as articulated by Professor Connie Backhouse and a group of women law students at the University of Western Ontario, the argument is that prostitution should not be treated as a social given in Canada and that the law should address its root cause, the apparent need on the part of men to satisfy their particular sexual urges and proclivities through the availability of a special class of women ready to respond for money. It is this male behaviour which creates the need for prostitutes and furnishes the conditions in which other males are able to exploit them, in particular the procurers and pimps. The proponents of this view went on to suggest that we should not, as a society, continue to countenance such exploitative demand and behaviour, and the law should be invoked to penalize firmly and consistently both the consumers of and traders in women's sexual services. In concrete terms this means making it an offence to purchase or offer to purchase the services of a street prostitute, to stiffen the penalties for operating a bawdy house, and living on the avails, and to remove the corroboration and time limitation requirements from the procuring offences. At the same time, the victims of the aberrational behaviour of males, the prostitutes, should be recognized as such and the proscriptions against them removed from the *Code*.

The underlying motivation of this approach is one with which we can empathize. However, there is a fundamental question which may be raised, and this is whether the law is likely to provide the instrument for social change which the advocates of this view desire. It may be argued that it is social strategies such as education and other forms of non-coercive socialization which are the most likely to succeed, and that law can at best play an ancillary role in changing attitudes and behaviour. This approach also depends on acceptance of the thesis that prostitutes really have no desire to engage in this sort of life, and that, even if they do, they should be protected from their own rash choices. It is at least arguable that the presumption should be that an adult person has the responsiblity for making decisions about lifestyle and career and should not be shielded from that responsibility and its consequences unless he or she is being grossly exploited.

In the detailed form in which the proposal is put, there are some inconsistencies of purpose. If the law is to be used as a major strategy for rooting out this form of sexism, it is strange that the legal responsibility of customers should be limited to those who choose to use the services of street prostitutes. There is, indeed, every reason, in principle, why it should also run to those who use the services of prostitutes in private. The problem here is, of course, the one raised above, that society would need a repressive form of morals police to enforce such a broadly based proscription. However, without it the notion that the law has a significant role to play in reducing the demand for prostitution loses a good deal of credibility. It was suggested to the Committee in reply to a question along these lines that by using the law to move prostitution off the streets the securing of such services would be made that much more expensive, which would provide a disincentive to potential male customers. To what extent the "sins of the flesh" are amenable to such reasonable cost/benefit analysis is difficult to determine without the sort of research which would relate the model to the demand for and provision of sexual services with Canada.[6]

It is not beyond the bounds of possibility, too, that a *Criminal Code* provision which distinguished between the buyers and sellers of sexual services would be open to *Charter* challenge under the equality provisions in section 15. To counter the challenge a very convincing argument would have to be made that the relationship between customer and prostitute is so unequal and the prostitute so generally disadvantaged that special protection is warranted.

The Committee has weighed each of these suggested options carefully. Moreover, it has found opinions in most of them with which it can identify. In fashioning its own recommendations, it has been influenced in some respects by the specific suggestions of groups and individuals, in others by the process and substance of the reasoning contained therein, and in yet others, by both.

2.5 Social Strategies

In addition to the range of legal options set before us, a number of groups and individual presenters were very helpful in suggesting various social strategies which should be adopted to deal with prostitution. Indeed, in some cases, the point was made that we should be looking to non-legal strategies and mechanisms to deal with the problem, rather than the blunt instrument of the law. The briefs and presentations which dwelt on these issues came from individuals and groups of social workers; women's groups and individual women; male organizations against the exploitation of women; some mainline church organizations, and several politicians.

The suggestions which were seen as complementary included:

1. Raising public awareness of the incidence of social abuse of and incest with children in Canadian society.
2. Improving not only the enforcement of the law against but also the treatment opportunities for those engaging in sexual abuse and incest.
3. Introducing or improving programs of social and sex education, with emphasis on responsible approaches to sexuality.
4. Applying greater funds and energy to institutions and programs for runaway youths engaged in prostitution, in particular drop-in-centres, hostels, work and recreation programs and the employment of greater numbers of street workers.
5. Dedicating funding to the development of havens and halfway houses for adult prostitutes and their assimilation back into the community.
6. Conducting more extensive research into prostitution as a social phenomenon.

These recommendations reflect a deep and well placed concern to view prostitution as a problem which can only be addressed satisfactorily as one which typically has its roots in childhood sexual and socialization experiences. The report of the Committee on Sexual Offences against Children and Youths (Badgley Committee), the studies commissioned by the Department of Justice for the Committee and presentations by social workers and agencies all suggest that for many prostitutes, the introduction of the trade came during the teenage years. The message is clear that any set of strategies which are directed solely at adult prostitutes will fail.

The Committee has found all of these suggestions useful in formulating its own view of prostitution as a social problem, and in developing its recommendations.

Footnotes

[1] Peat, Marwick & Partners, *A National Population Study of Prostitution and Pornography* W.P.P.P.#6.

[2] See Part III, Section II, Chap. 34.

[3] *The Criminal Code Amendment Act*, S.C. 1972, c. 13, s. 12.

[4] *R.* v. *Westendorp* (1983) 2 C.C.C. (3d) 330 (S.C.C.).

[5] See Part III, Section II, Chap. 32.

[6] For an article which suggests that the use of the law to increase the costs of doing prostitution business does result in a decrease in demand, see M. Fish, "Deterring Sex Sales to International Tourists: A Case Study of Thailand, South Korea, and the Philippines", (1984) 8 *Int. Journ. Comp. and Applied Crim. Justice* 175. There may be difficulties, however, in extrapolating from the specific context of tourist demand to the broader range of domestic demand for prostitutes.

Chapter 40

The Committee's Recommendations on Prostitution

1. Introduction

As a result of its hearings, the research commissioned by the Department of Justice for the Committee and our own research, the Committee has concluded that an overall strategy to deal with prostitution should emphasize both legal and social reform.

The reasons for the existence of prostitution and its continuation are clearly complex and difficult to determine. Further, the reasons which might account for the phenomenon in one society do not necessarily account for its presence in another. Nor is prostitution viewed with the same mix of inevitability, dislike and acceptance that is characteristic of the Canadian response to the situation.

Within Canadian society, prostitution is seen not just as a social phenomenon but as a social problem. That is, it is an issue to which we should direct our attention and resources in order to effect some change in the current situation. As a society we view prostitution from this perspective because of our religious and philosophical beliefs about human nature and sexual relations in particular, and because our legal, economic and social systems have resulted in prostitution being carried out in a certain way.

While religious and philosophical consideration lead to a questioning of whether prostitution should or must disappear from our society, or whether we should and must assume that the selling of sexual services will always be with us, it is evident that the current ways in which prostitution is carried out are problematic from virtually everyone's point of view. We need, therefore, to look at our society to determine whether we can bring about changes which would at least eliminate the most harmful aspects of the current situation.

The analysis of the legal system and its effect on prostitution practises has been the focus of our attention, but we know that prostitution cannot be addressed solely through the law. It is apparent from all the information we have considered that the current practise of prostitution in Canada is also related to three interdependent factors: (a) the pervasiveness of sexism in Canadian society; (b) our partial recognition of the complexities of sexuality and sexual preference; and (c) the failure to develop educational and social programs to assist young Canadians in dealing with problems of sexism, sexuality and sexual identity in a responsible, confident way. These are conditions which are much more likely to be susceptible to long range social planning than to transitory legal expedients.

2. The Economic and Social Responses to Prostitution

Conscious attempts have been made by the federal, provincial and territorial governments to work towards economic and social equality between the sexes, and some of these efforts have borne results. Still, however, the right of women to equal participation and treatment, in all aspects of our society, has yet to be fully realized.

While, as we have suggested earlier, the causes of female prostitution are complex, it is true that economic disadvantage is one of the elements, whether it be in the home and family background of the individual prostitute, in her own living experience or in both. It seems to us that until Canadian society comes to terms with the causes of economic disparity between men and women, then the likelihood that a proportion of women will seek to support themselves and their families through prostitution will continue to exist.

Although economic factors are perhaps more significant in producing female prostitution, they also play a role in male prostitution. Here the economic roots of prostitution are related in part to the problems which disaffected youth may have in surviving in a highly competitive labour market, and in part to the discrimination in employment that some gays, and gay males in particular appear to encounter. The latter problem is accentuated in the case of transsexual individuals who may find themselves virtually unemployable.

Eradicating economic disparity and discrimination in employment will, we realize, take a long time. Nonetheless, we are confident in asserting that one of the reasons, and perhaps the major reason, that women and young people prostitute themselves is economic. To the extent that women have equal opportunity to participate in the economic system then the decision to become a prostitute will not be made because that seems to be the only possible option. Equality in employment cannot and will not be achieved in isolation from other advancements in women's status. Similarly it is our belief that improvements in women's status will signal an acceptance of a greater commitment to equality in our society, that will affect all minority groups and will assist in their full participation in Canadian society, again decreasing the likelihood of prostitution being seen as the only viable career.

Recommendation 50

> **The government of Canada in conjunction with the governments of the provinces and territories should strengthen both their moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference.**

The Committee also believes that adequate social programs must be available to support and assist women and young people in need. The present economic climate is conducive to cuts in social services and programs. To the extent that such cuts are made, we believe that more women and young people will see their only means of livelihood being in prostitution. Equally, if social programs are cut the opportunities for prostitutes to move out of the business will be lessened.

Recommendation 51

> **The government of Canada in conjunction with the governments of the provinces and territories should ensure that there are adequate social programs to assist women and young people in need.**

Typically, sex and sexuality in our society have been considered matters outside the legitimate focus of social discourse. It seems to have been assumed that, by a process of osmosis, male and female will develop an understanding of their sexual roles, be able to cope with their sexual feelings and understand how to interact sexually. Not surprisingly, sexual information and self-perception have often come through a variety of extrafamilial and non-professional sources, and in particular, through the strange brew of fact and fiction served up by peers. Accordingly, the deep-seated views that males are naturally aggressive and need to have their sexual appetites satisfied, while females are passive, dutiful and sexually submissive, tend to be projected from one generation to another. We may have hoped that the so-called "sexual revolution" of the 1960's was going to change all of this, and it may be that for some women it has produced release from the sexual subservience of the past. However, in retrospect, it appears as if one of the major consequences of this movement towards sexual liberation may just have been to cause some men to insist on publicizing and glorifying their stereotyped dominance in sexual matters. The liberation of women, in this context, is all too frequently the freedom to be a Playboy bunny or other sex object.

The corollary to the dominance of men, of course, is the subordination of women. The acceptance that women are subordinate and unequal has a lot to do with prostitution: its acceptance as an enduring social phenomenon rests on our acceptance of the notion that women exist, in part, to answer men's sexual needs. Until Canadian society recognizes the seriousness of these wrong perceptions, and the immense personal and social harm which they cause, any chance of creating a social atmosphere which does not, in effect, promote prostitution is slight.

Recently another aspect of our awkwardness with sexuality has manifested itself. We do not seem to have dealt confidently or generously with persons who find that they are homosexual in their orientation. It is hardly surprising that we find an increasing number of males particularly juvenile males, prostituting themselves as a means of exploring and confirming their sexual identity.

Any discussion of the roots of prostitution in the distorted notions of sexuality which exist in our society would be incomplete without mention of the sexual background and experiences of those males who use the services of prostitutes or who exploit them financially and emotionally. As we stated earlier, the Department of Justice research studies reveal precious little about the motivations of customers, procurers and pimps. Nor is there very extensive research literature at all on these players in the game. What research there is suggests that some of these people at least have themselves been victims of sexual abuse or repression which has manifested itself in aberrant and abusive behaviour to women. Others do not appear to have had such experiences but use the services of prostitutes for expedient reasons, which include the desire to have sexual relations which are impersonal and carry no responsibility.

Significant changes in sexual attitudes and practices within a society depend upon both education and other forms of socialization. Clearly, the dividends of such programs are not immediately realized and will take time to have perceptible beneficial impact. However, the Committee feels very strongly that we should make a start now. Our hearings revealed a need for educational programs in Canada specially geared to deal with sexuality in a responsible and sensitive way. We understand that this vacuum is not always attributable to educators. The parents in a community must be responsive to the idea of such programs if they are to be successful, and some parents have serious reservations about the programs in general or a particular program.

It is our belief that governments, federal, provincial and territorial have to take the lead in this area, by funding a significant national program of research into sex and sexuality, and education about these issues which would attract leading experts from both Canada and abroad, and specific pilot projects for use and testing across the country. In particular, it is important, as the Badgley Committee Report points out, that particular attention be directed towards educational programs on sexual abuse and the risks inherent in prostitution. We believe that with the necessary commitment at the governmental level, supplemented by private support, especially from foundations, we can make great progress towards engendering more responsible and mutually caring attitudes towards sex and sexuality among young Canadians.[1] We think it particularly suggestive that the Swedish Government and Parliament have committed that nation in recent years to an ambitious program of this sort.[2]

Recommendation 52

> **The government of Canada, in co-operation with the provinces and territories, should provide financial support for both research into and the implementation of sensitive and relevant educational programs on human sexuality for use in the country's schools; in particular the governments should jointly fund a National Centre and Program in Sexuality and Life Education to bring together the leading scholars and clinicians in the field to conduct research and formulate program and pedagogical models.**

Although the Committee is convinced that long term strategies of the type outlined above are absolutely necessary if, as a nation, we are to begin to remove the causes of prostitution, we also think it highly unlikely that significant results are going to be achieved overnight. Progress will be slow and will demand great patience. In the meantime, prostitution will continue. This means that society will be faced with the question of what to do about those who for one reason or another have been drawn into this life and remain in it, as well as those who have tried it but have decided to leave it. We are also inclined to believe that even with new and more mutually respectful attitudes towards sexuality, there will be some for whom sex will continue to be an impersonal experience for one reason or another, and who will want to purchase or sell it.

Given the likely continuance of prostitution as a social phenomenon, it is vitally important that consideration be directed to the welfare of those who are or have been involved in this life. The research done for the Committee on prostitution in Canada indicates that: (a) there are all too few social agencies and programs which meet the special needs of active or reformed prostitutes; and, (b) even where they do exist, they are viewed with some suspicion by the prostitutes. That the latter is not a necessary concomitant of such initiatives is shown by the relative success of the support provided to male homosexual prostitutes by gay groups, and of some programs for reformed prostitutes.

There is no doubt that there are serious difficulties in developing bonds with active prostitutes. They may be closely controlled by pimps who do not want to have third parties intrude, or, they may want to steer clear of any group or individual who they feel will be judgmental. In the light of these problems, it is important that programs which are developed are voluntary and staffed by people sensitive to the realities of the street scene and who will respond to need, rather than intruding. We hope that former prostitutes will be invited to help in such programs in order to play a very useful role in counselling clients and advising fellow agency workers. We are inclined to believe that, because there is need for flexibility in approach, there is room for initiatives by both public and private agencies, and that public funding should be directed to both. With the necessary incentives and adherence to standards, there are likely to be positive consequences which flow from private community initiative for and committment to programs of this type. Apart from the obvious benefits of community involvement in local problem solving, it is entirely possible that private organizations will be particularly imaginative in programing. Moreover, if they can establish both a good service reputation and a firm funding base in the private sector, they may find it easier to avoid the vagaries of government fiscal policies. It is, however, important that, whatever the agency, the approach be supportive without being judgmental, avoiding at all costs the view that their major objective is reform or (worse still) repentance. This is a field in which misplaced moral fervour or even unthinking condescension can be extremely counterproductive.

Recommendation 53

The government of Canada in conjunction with the governments of the provinces and territories should undertake the direct funding or indirect

financial support of community groups involved in the care and welfare of both practising and reformed prostitutes, so that adequate social, health, employment, educational and counselling services are available to them.

As we have indicated earlier in this report, given the time frame and resources with which we were working, it was not possible for us to commission and sustain the sort of research which would allow a complete picture of prostitution as a social phenomenon. We think that we have discovered enough about it to make the recommendations above, and a series of recommendations for reform of the law. We feel strongly that governments at the federal, provincial and territorial level need to collaborate closely in commissioning further research on prostitution, as a means of progressively informing attempts to remove the economic and social conditions which contribute to prostitution, and to deal with its adverse impact on those who are engaged in it. In particular we think that further research needs to be done on the character and motivations of customers, pimps and other male parties to prostitution; on the careers of prostitutes, including their introduction to the trade and tenure in it; on the working conditions of the complete range of prostitutes, including street prostitutes, call-girls, and operatives in escort services and massage parlours; and on the more pervasive problem of sexual abuse.

Recommendation 54

The government of Canada in co-operation with the governments of the provinces and territories should commission further research on prostitution as a means of informing attempts to address it as a social phenomenon, and to deal effectively with its adverse impact on those who are or who have been involved in .

3. Legal Responses to Prostitution

Although the Committee is convinced that the conditions in which prostitution thrives can only be satisfactorily addressed in the long run by well conceived and well-executed social strategies, it is also of the view that law has a role to play in dealing with it. There is no reason, in our opinion, for insulating the activity of prostitution from the law. To do so would be to attach a special immunity to it which would have no justification whatever, and in particular, would ignore the very real harms, conflicts and opportunities for exploitation which are associated with it.

The assertion that the law should have reference to prostitution does not dispose of the question of how the law should relate to this form of conduct. In our legal tradition it has been the criminal law which has been the dominant vehicle for dealing with it. It is only incidentally that prostitution has fallen within the ambit of administrative regulation. We have thought it important to set out our views about the ways in which the law should apply to prostitution, prior to articulating our specific recommendations.

We believe very strongly that the present law relating to prostitution is unsatisfactory for a number of reasons, some of which relate to philosophy and others to more pragmatic considerations. As so often happens with the development of criminal law, the present *Criminal Code* provisions reflect a number of underlying policies introduced at different times which do not sit well with each other. Moreover, it is clear that there has been a significant divergence between the potential of a particular provision for affecting behaviour and promoting effective enforcement and its record in practice.

We pointed to the two rather incongruous motivations for the criminal law relating to prostitution in Chapter 29: on the one hand, the view that prostitution as a social problem is the product of loose morals amongst women, and on the other, that women must be protected from immoral and devious males. In practical terms, this has resulted in prostitutes taking special legal responsibility for the adverse social consequences of the liaisons they form, and women in general being considered incapable of protecting themselves from "the blandishment of cads and rogues" with secret sexual agendas. As a consequence, women are treated as "whores" or "madonnas" depending on male assessments of their relative worth, without any recognition of their views or feelings, let alone of the problems which give rise to prostitution. Apart altogether from whether this part of the criminal law has any rhyme or reason to it, it reflects a sexist view of women.

The view that women are the more culpable parties in the relationship with customers dies hard. Although, as we have pointed out in the analysis of the present law, the repeal of the "Vag. C" provision from the *Code* removed the most glaring aspect of the double standard, vestiges of it remain. Mention has been made in Chapter 29 of the uncertainty which prevails as to whether section 195.1 extends to both customers and prostitutes, as a result of conflicting appeal decisions in Ontario and British Columbia.[3] Leaving that issue aside, it is clear that enforcement practices, whether in relation to prosecutions under the *Code* provision or municipal by-laws, have invariably focused on the prostitute. From the point of view of the police, this makes operational sense. It is the prostitute who is visible, known, and less likely to be subject to embarrassment if charged. Police forces are still predominantly male in composition, and this feature accentuates such enforcement practices.

While prostitutes still tend to be on the receiving end of the law vis-à-vis customers, they are afforded little effective protection by the law when it comes to exploitation by those who profit from their activities. As we have pointed out in our analysis of the law and its enforcement, it is both difficult and costly to secure convictions for running common bawdy houses, procuring, and living on the avails. Typically, the police have to resort to expensive surveillance and undercover ploys which take both time and money, often without any certainty that a conviction will be secured. Accordingly, the police tend to respond only when complaints are registered by citizens or by prostitutes who have been victimized. Thus the ability of the criminal law to deal with exploiters is much more apparent than real.

Although female prostitutes and their activities have been the focus of the criminal law traditionally, male prostitutes have been almost totally ignored until recently. True, homosexual activity, even in private, was the subject of criminal sanctions and often harsh and intrusive enforcement for many years. However, the application of the law seems only infrequently to have been related to prostitution. Given the draconian quality of the law on homosexuality, there was little chance that those offering homosexual services would do so in public. In private, their conduct was no different from those engaging in sexual activity without payment. The relaxation of the law relating to homosexuality has changed this. Those with a homosexual orientation who wish to offer sex for money, typically teenagers, are no longer reticent about seeking customers in public.

Although the living circumstances of male prostitutes are different in some ways from those of their female counterparts, especially in the absence of pimps, they too are subject to discriminatory treatment. The male street prostitute tends to be viewed with considerable distaste and suspicion by some police officers who find it difficult to identify in any way with someone of a different sexual orientation. Thus, while police officers are often well disposed or at least paternalistic towards female prostitutes, they often despise male prostitutes. The result is that they tend to be rougher and more peremptory in their treatment of the latter, and less likely to assist when he is the victim of criminal conduct, for example, assault or theft. Furthermore, the police record on raiding male prostitution establishments, especially bath houses, has tended to be much more vigorous and aggressive than that on massage or body rub parlors involving heterosexual sex.

Because of the haphazard and inconsistent way in which the law of prostitution has developed, it ignores the tensile quality of prostitution and the linkages between the various forms of prostitution. More particularly, the law, in both its substance and enforcement, fails to recognize the reality that if pressure by the law is exerted in one context or location, it will produce a shift of the activity to another setting or location. This is seen in street prostitution where police charges or harassment in one location will produce a migration or dispersal of prostitutes to other areas which appear to be less subject to police scrutiny and public concern. It is also manifest in the examples of prostitution moving on or off the streets in correlation to vigorous enforcement against street soliciting, soliciting in bars or bawdy house activity.

In the absence of widespread and coordinated campaigns of enforcement, to which neither the police nor the public seem committed, the result is that the law enforcement authorities merely spend their time chasing the problem rather than resolving it. Although it might be objected that this is, to a large extent, the product of the sad fate of section 195.1 at the hands of the courts, it is our impression that it is a problem which afflicts any jurisdiction with criminal law provisions relating to prostitution, even those in which prostitution itself, in all its manifestations, is criminal, such as most jurisdictions in the United States. The enactment of draconian provisions against prostitution simply does not ensure its demise.

The final general criticism to be made relates to the moral and practical ambiguity of the present law. On many occasions at our hearings, we were told by those who favoured the introduction of stiffer provisions relating to street prostitution that they were not concerned with the morality of prostitution, merely the public distress and harm which it causes. It seemed to be implicit in this view that somehow soliciting and prostitution were beyond the reach of law if conducted in private. This is, of course, not the case.

Although, as we have pointed out, the law on prostitution is only enforced in a perfunctory way, it is nevertheless enforced from time to time, even in relation to activities in private. The result is that there is just enough in the way of uncertainty about the prostitute's legal status whether on the street, using a private residence, or while employed by an escort service or massage parlour, that the individual concerned has the sense of being a legal outcast. Needless to say, the greater facility one has for operating in complete privacy and confidence, a facility which is typically a reflection of relative wealth, the easier it is to escape scrutiny. Accordingly, the law in its operation favours those who have the resources to be discreet, while victimizing those who are not so blessed. In the result, while we talk of prostitution being free of legal sanction, we in reality use the law indirectly and capriciously to condemn or harass it, providing no safe context for its operation except that which can be bought by the prostitute of means, or, as is more likely, the well-heeled sponsor or sponsors.

The law on prostitution, as presently constituted, has not achieved what is presumably its theoretical object, that of reducing prostitution (or even of controlling it within manageable limits). Moreover, it operates in a way which victimizes and dehumanizes the prostitute. Change in the law is, in our opinion, clearly needed.

We see no virtue in replacing the present system with a more repressive regime. There is no evidence in the history of this country, or in those countries like the United States which retain a draconian system, that the results of such an approach would justify it. Indeed, we are inclined to think that a move in that direction would subvert any attempt to treat prostitution sensitively as a major social problem. Unlike some of those who appeared before us, who seem to see criminal law as some magic solution to social problems, we are only too aware of its shortcomings. Criminal law can, of course, affect people's behaviour in beneficial ways, and provides a vehicle for society to make its corporate displeasure known when someone has breached its rules. We doubt its validity, however, when it fails to change behaviour, and can only be indifferently enforced. Not even the transcendant symbolic function of criminal law, which is also important, can compensate for these weaknesses.

The approach which the Committee takes stems from its concern to underline the elements of equality, responsibility, individual liberty, human dignity and appreciation of sexuality which we have emphasized in Chapter 2. It is our belief that as long as prostitutes continue to be open to prosecution as, for example, the inmates of bawdy houses or for soliciting on the streets, our concern with prostitution will continue to be misdirected and the law will get in the way of more beneficial social strategies. Although we do not in any way favour people pursuing prostitution as a career, we also believe that adults who determine that they want to pursue that lifestyle and do so without engaging in incidental criminal activity should be able to do so with dignity and without harassment. Accordingly, we are of the opinion that the prostitution-related activities of prostitutes should be decriminalized as far as possible.

We have more sympathy for the prostitute than for the customers whose sexual demands generate the business in prostitution, who do not have to suffer the general hazards and indignities of the prostitute's life and who find it easier to remain anonymous. Yet we find no justifiable basis for singling out customers for special treatment by the criminal law. The suggestion that the criminal law should punish and deter only the male players in prostitution, including the customers, could not, we think, work without the vigorous and extensive enforcement which we have rejected above. Moreover, it again attaches too much significance to legal expedients as the effective instrumentalities of social change. Accordingly, we favour the decriminalization of the prostitution-related activities of customers as far as possible.

We are aware that prostitution-related activities do cause harm and interference to third parties. The activities may be tied in with non-prostitution-related conduct which contravenes other sections of the *Criminal Code*. Moreover, the activities may be conducted in such a way that they cause unreasonable interference with others. In our minds, there is no justification for shielding prostitutes or customers from legal responsibility for criminal acts or for creating definable nuisances. The argument that the prostitutes are victims and, therefore, not accountable for their acts, which was made before us on occasion at the hearings, is, in our opinion, no more compelling than it is in the case of disadvantaged individuals in general. The law, necessarily we believe, is of the view that all adults, with the exception of those who are mentally incompetent, take full legal responsibility for their actions.

Recommendation 55

The prostitution related activities of both prostitutes and customers should be removed from the Criminal Code, except insofar as they contravene non-prostitution related Code provisions, and do not create a definable nuisance or nuisances.

It is not enough, in our opinion, merely to advocate the decriminalization of the activities of prostitutes and customers, subject to the exceptions mentioned. Attention must be directed also to those *Code* provisions which address the commercial and exploitative characteristics of prostitution. This, we believe, must be done in the light of concern for the welfare of prostitutes and for the effect of their activities on others. If prostitution is an inevitable part of life, at least in the short run, then it should operate in the least offensive setting.

To its credit, the law has traditionally sought to deprecate and punish the commercialization and exploitation associated with prostitution. We are inclined to believe, however, that the concern has been too broad. We are of the opinion that prostitution-related activities should not take place in public places because of the offence involved and the proven dangers to prostitutes which the street life produces. The question thus arises whether some leeway should be provided to it off the street. We believe that it should. However, if some allowance is made for its legal operation in private, it should operate in a way which will minimize the chances of harm to third parties and the community at large, reduce the opportunities for commercial crime, and ensure the health and welfare of the prostitutes. The question is how far to go in removing or limiting the present *Criminal Code* provisions in order to achieve these objectives.

With the exception of one member of the Committee, Ms. Ruffo, we have rejected the possibility of removing from the *Criminal Code* all the provisions which deal with the context and side effects of adult prostitution. These sections deal with bawdy houses, procuring and living on the avails, and soliciting. Repealing them completely would mean that the exploitation and coercion of prostitutes could only be dealt with by the general provisions of the *Code*.

Ms. Ruffo is of the opinion that persons engaged in the business of prostitution should be treated like any other person engaged in business. She feels that the maintenance of special regulations in this domain contributes to the continuation of the exploitative schemes already denounced in this part of the Report.

The evidence gathered during public hearings held across Canada supports, in Ms. Ruffo's opinion, her view that persons engaged in the business of prostitution are full members of society, responsible in all respects, liable for their actions and enjoying the same liberty, dignity and equality as any other person. Consequently, Ms. Ruffo objects to supporting the attitude of a paternalistic society which, on the one hand, would create special regulations for persons conducting the business of prostitution, for example, by allowing them to receive their clients in their residence on the condition that they be no more than two, and which, on the other hand, will turn these persons into criminals if they do not obey that regulation. She observes that, on the one hand, we protect these people as if they were incompetents, while on the other hand, if they break certain rules, which moreover are completely discriminatory, they will be penalized as criminals.

How can the Committee, she asks, in such an inconsistent manner, and at the risk of losing its credibility, talk about equality, dignity and liberty?

Ms. Ruffo notes that persons engaged in other businesses, for example, shoemakers and hairdressers, cannot work in their home unless they have a permit to do so; they are governed by-laws and rules. Besides, they do not find themselves in criminal court if they contravene the provincial laws or municipal regulations concerning their commercial activities. In contrast with persons engaged in the business of prostitution, their commercial activities are not regulated in any special way.

Ms. Ruffo is convinced that Canadian society has been given a rare opportunity to seriously reconsider the problems of inequality and of the exploitation of people for the benefit of others. Obviously, the present situation is not the happiest one, the point is not to perpetuate it unnecessarily.

It is the view of Ms. Ruffo that, in this type of activity as in several others, people are the prisoners of degrading occupations; society must increase its efforts to make it possible for each of them to have access to more gratifying and humane work.

Finally she questions why we should retain special provisions in the *Criminal Code* if we sincerely believe that persons engaged in the business of prostitution have the same right to equality, dignity and liberty as do others. The law she points out, applies to them in the same way as it does to other people and they should be protected by the law in the same way.

The other members of the Committee, while sympathetic to the objectives of this total decriminalization approach, are not satisfied that the more general *Criminal Code* provisions are adequate to take account of the relational exploitation which is apparent in prostitution. Offences such as assault, kidnapping and extortion tend to concentrate upon single incident criminality. Moreover, we worry lest removing from the *Code* all mention of the exploitation of prostitutes by bawdy house operators, pimps and procurers simply appears to endorse the activities of these potential exploiters. Thus, we think that the criminal law should continue to concern itself with prostitution establishments (bawdy houses), procuring, and living on the avails. However, we think that the constraints on these activities should be narrowed in ambit.

Over and above these concerns with the criminal law, we are not at all sure that in the absence of greater discussion and debate between the various levels of government, the result of a total devolution now of legal responsibility to the provinces and municipalities would produce the anticipated result. Indeed, we incline to the view that there would be significant resistance by provincial and municipal authorities to devising regulatory regimes to replace the present complex of criminal law provisions.

We think that the procuring and living on the avails sections of the *Code* should be retained, but the emphasis in them should be on the use or threat of violence, rather than exploitation in general. We take the point that, unless there is a very clear reason for doing so, the criminal law should be used sparingly if at all to protect responsible adults from personal relationships, which although not ideal, are not characterized by the actuality or threat of physical harm. Moreover, we are of the view that including non-coercive relationships in the *Code* achieves nothing in practical terms, because typically they do not give rise to prosecutions. Although we recognize the difficulties in devising more effective methods of enforcing the law against violent and abusive procurers and pimps, we are of the view that any change in the law along the lines suggested should be complemented by the development and funding of special units in police forces to investigate and neutralize their activities. We are aware that certain police forces in the United States which have developed special details to work humanely and sensitively with prostitutes have had some success in pursuing the pimps exploiting these people.

Application of this narrower concept of criminal behaviour would result in individuals, and also some businesses, falling outside the ambit of the criminal law. This would be true, for instance, of escort and dating services which take the business to the client rather than the reverse. From the research reports which were conducted in the Department's research program, we have the impression that these businesses are often run in a business-like fashion, are safe for the prostitutes and are usually much less exploitative than are parasitic pimps. If no force or coercion is used in their operations then they would not be caught by the prohibition. They would, however, be subject to municipal regulation. Municipalities have shown that they have the will, capacity and ingenuity to establish and enforce regulatory regimes, which, while demanding, are by no means impossible for escort or dating services to comply with.

Recommendation 56

> **In the Criminal Code provisions dealing with exploitative conduct other than running a prostitution establishment, the concern of the criminal law should be confined to conduct which is violent or which threatens force; special police details or units should be established, and adequately funded, where required, to investigate and prosecute violent and abusive procurers and pimps; any prostitution business which operates without contravening the Criminal Code should be subject to municipal regulation.**

The present bawdy house provisions proscribe all prostitution establishments, even a single prostitute operating out of a residence. The majority of the Committee favour a relaxation of that requirement. Originally considering an exemption for only one prostitute operating out of her residence (which is the present law in the United Kingdom) we were persuaded in the course of our deliberations to recommend that the exemption extend to two prostitutes working out of their residence. This option may well provide a desirable alternative to working the streets, because we expect it would be free of the exploitative elements normally associated with bawdy houses. By restricting the exemption to those working out of their own residences, we hope we have minimized the chance that entrepreneurs would promote clustering of prostitutes together into some *de facto* commercial premises. Two prostitutes together might well help each other, with rent, child care, and emotional support, instead of exploiting each other. Where two are together, they could do for each other the things which a pimp is sometimes said to do, i.e., provide support or resources in a crisis.

However desirable this small-scale alternative to street activity may be, we are concerned that under the residential exemption which we propose, uncertainty as to the legal status of prostitutes working out of their own homes may remain. Municipalities have the power to zone and license businesses.

Even a *bona fide* exercise of such power by a municipality may reduce opportunities to utilize the one- or two-person exemption. Other problems with the exemption involve disparities between the prostitute carrying on this business and other providers of service: we hesitate to put in place a regime that in fact gives an advantage to the prostitute over other businesses in terms of where they can operate. Problems of avoiding nuisances to neighbours will also have to be contended with. Because the one, or two, person exemption is not, in fact, an ideal solution, we have proceeded beyond it to explore the idea of permitting prostitution activities in small-scale non-residential prostitution establishments. These may well provide a way of avoiding some of the lingering difficulties of an *ad* hoc type of exemption. We are aware, however, that this option itself presents some negative as well as some positive features.

We recognize that this suggestion will be a controversial one and did not reach it lightly. However, given what we consider to be the desirable aim of moving prostitution off the streets, and the questionable status of residential prostitution, it is an option which, we feel, should be considered.

It is our belief that given the opportunities for exploitation and public nuisance in commercialized sex, such an exemption can only be justified where strong and effective regulatory mechanisms are in effect. Moreover, we wish to make it clear that such establishments, if established, should be non-residential and small in scale. They should under no circumstances permit the employment of those under 18. Given the division of powers in Canada, we are convinced that any moves to relax the law on prostitution establishments beyond a one, or two, person exemption of the type suggested must be the responsibility of the provinces.

Recommendation 57

> **The criminal law relating to prostitution establishments should be drawn so as not to thwart the attempts of small numbers of prostitutes to organize their activities out of a place of residence, and so as not to prevent provinces from permitting and regulating small scale, non-residential commercial prostitution establishments employing adult prostitutes.**

4. Amendments to the Criminal Code

4.1 Street Prostitution

Recommendation 58

1. **Repeal section 195.1 of the Criminal Code.**
2. **Amend section 171 of the Criminal Code as follows:**

SECTION 171(1): DISORDERLY CONDUCT, INDECENT EXHIBITION, LOITERING, SOLICITING, ETC.

(1) Everyone who

(a) not being in a dwelling house causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing or using insulting or obscene language,

(ii) by using sexually offensive remarks or suggestions,

(iii) by being drunk, or

(iv) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are there,

(d) stands, stops, wanders about in or drives through a public place for purposes of offering to engage in prostitution or of employing the services of a prostitute or prostitutes and on more than one occasion.

(i) beckons to, stops or attempts to stop pedestrians or attempts to engage them in conversation,

(ii) stops or attempts to stop motor vehicles,

(iii) impedes the free flow of pedestrian or vehicular traffic, or of ingress or egress from premises adjacent to a public place

(e) disturbs the peace and quiet of the occupants of a dwelling house by discharging firearms, by any of the forms of conduct in paragraphs (a), (b), (c) or (d) of this subsection, or by other disorderly conduct in a public place,

(f) not being an occupant of a dwelling house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of the building or structure to which at the time of such conduct, the occupants of two or more dwelling houses comprised in the building or structure have access as of right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction subject to a maximum fine of $1,000.00.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a), (d), (e) or (f) was caused or occurred.

3. Remove definition of "public place" from section 179(1) of the Criminal Code, and revise the definition of "public place" in section 138 of the Code to read

'public place' includes any place to which the public have access as of right or by invitation, express or implied, doorways and hallways of buildings adjacent to public places and to vehicles situated in public places.

COMMENTARY

Although the partial decriminalization approach adopted by the Committee and evident in its proposals on bawdy houses, procuring and living on the avails detailed below, can be expected to make the provision of prostitution services in private more attractive, it would be naive to suppose that these changes will spell the complete demise of street soliciting. Economic and social realities, especially the relative ease and speed of providing the services required and the desire of the customer for anonymity, the demands of pimps, as well as personal preference, will lead some prostitutes to take to the streets. Furthermore, it is clear that as long as street prostitution exists, annoyance and interference will accrue to others, whether members of the public using the streets or other public places, or residents or occupants of adjacent properties. The Committee is of the view that those who are adversely affected by street prostitution are entitled both to consideration by the law, but more than that, to forms of legal protection which can be effectively enforced. There is to our minds no justification for ignoring the disturbance and interference with the peace and quiet of citizens which is associated with street prostitution. Few, if any, of those who are not currently affected by the nuisance caused by street prostitution would be ready to ignore its negative impact on them, if suddenly and consistently confronted by it. Although doubts were expressed to us in the course of our study about the necessity and merit of using the criminal law to deal with this problem, we have concluded that it must continue to have application. The analysis by the Committee of constitutional problems associated with the enactment of proscriptive law by the provinces and municipalities; the difficulties associated with developing any satisfactory regulatory regime for street prostitutes and the risks and uncertainties of civil litigation, have persuaded us that the *Criminal Code* must be used to deal with the adverse side effects of street soliciting.

Having said that the criminal law has a justifiable role to play here, it is important to state clearly what we think its focus should be. In the opinion of the Committee, it is the nuisance caused to citizens, whether by harassment or obstruction on the street, or by unreasonable interference with their use and enjoyment of property, which is the ill to be addressed. This means that some perceptible interference with members of the public or neighbouring occupiers must be proven. There is no justification, in the minds of Committee members, for reviving the old status offence of being a street walker unable to give a good account of herself. We also believe that it should not be sufficient basis for attaching criminal responsibility that a prostitute or a customer offer to engage in prostitution. Apart from the fact that it is difficult to characterize this as an intolerable interference, the methods which would be employed by the police to secure convictions are unacceptable. While undercover and decoy work may be necessary in certain cases to provide a basis for prosecution in the case of serious crime, we see no justification for its use in dealing with this relatively minor form of criminality. Accordingly, we do not agree with the Report of the Justice and Legal Affairs Committee of the House of Commons that a new offence of "offering to engage in prostitution" should be inserted in the *Code*.

The Committee is further of the view that the present soliciting section of the *Code* is unsatisfactory as a vehicle for proscribing the nuisance effects of street prostitution. Clearly its inclusion in the *Criminal Code* reflects a concern to give soliciting a nuisance characterization. Unfortunately, by interpretation the courts, especially the Supreme Court of Canada in *R.* v. *Hutt*[4] and *R.* v. *Galjot and Whitter*[5] have unduly narrowed its application. The notion of nuisance in criminal law extends beyond interference with the individual citizen to interference with the public at large, in effect to interference with the environment represented by streets, public places and neighbouring premises. Viewed in this light there is no reason why the nuisance effects of street prostitution should be confined to the ongoing harassment of one individual, and not extend to the overall interference caused to citizens in the vicinity by a pattern of entreaty to a succession of individuals. Whatever the doctrinal weaknesses in the case law, the Committee is convinced that both the caution with which the courts now treat section 195.1 and the conviction in the ranks of the law enforcers that it is worthless, have deprived it of any force, and that it should, therefore, be repealed.

What the Committee suggests in its place is the amendment of section 171 of the *Code*, a provision which already has a distinctive nuisance flavour to it, so that it will relate clearly to the nuisance problems associated with street prostitution and does so in a way which makes it clear what sort of conduct is unacceptable.

Section 171(1)(a) is revised by making it clear in clause (ii) that sexually offensive language in a public place directed at another person should not be tolerated. This represents a response to the feeling of anger and frustration which many women who live in or travel through areas affected by street prostitution feel at the verbal abuse to which they are subjected by prospective customers of prostitutes. A new paragraph (d) has been added to section 171(1) which deals explicitly with the nuisance impact of street soliciting. This express reference is first of all designed to ensure that the adverse effects of street soliciting are a species of general nuisance conduct, thus making it impossible for the courts to ignore or circumvent them, as they have done in prosecutions relating to prostitution under the section in its present form. Secondly, it seeks to explain, in some detail, just what the nature of the nuisance is. The latter lies not only in the repeated solicitation of one individual, but extends to sequential overtures to members of the public in the area. It is the adverse effect on the locale which is stressed rather than the impact on a particular person. Thus, more than one overture, whether it be in relation to a particular individual, or to two different individuals in sequence, is sufficient to establish a nuisance.

The wording of paragraph (d) also makes it clear that it is designed to apply to customers as well as to prostitutes. It contemplates conduct from a vehicle as well as that on the street, and refers to "offering to engage in prostitution or of employing the services of a prostitute or prostitutes". This formulation would embrace the potential customer on foot or who is curb crawling. Existing paragraph (d) of Section 171(1) has been split into two paragraphs (e) and (f) in the revised section. Paragraph (e) represents an attempt to define more clearly what is disorderly conduct which disturbs those occupying dwelling houses adjacent to public places. As presently worded the paragraph is vague in substance and ambit. The amended form would make it clear that prostitution-related activities of the type caught by the new paragraph (d) could also be proceeded against under new paragraph (e).

Section 171(2) has been retained and made applicable to paragraphs (a), (d), (e) and (f). The purpose of this subsection is to get round the difficulty that prosecution of conduct which disturbs, interferes, or annoys has traditionally depended upon citizen complaint and willingness to testify. Complaints, as the Committee heard during its hearings, are not often forthcoming because of the feared consequences and the trouble of going to court. Moreover, when they do occur they are sometimes suspect as involving unduly subjective judgment on the part of complainants. Subsection (2) allows the prosecution to proceed on the basis of police evidence or corroboration of the circumstances. Given the problems mentioned above, and the reality that in some of these situations it will only be the police officer observing the whole scene who can see its nuisance effects, the Committee believes the subsection should be retained as amended.

We have recommended a higher maximum fine than is the norm for a summary conviction offence ($1,000.00 rather than $500.00) to provide greater flexibility to the courts in the case of the repeat offenders.

With the repeal of section 195.1, the present definition of "public place" in section 179(1) would become redundant. However, there is an identical formulation of "public place" in section 138 which applies to the whole of Part IV of the *Code*, including section 171. It is the Committee's view that this definition should be revised along the lines suggested for two reasons. In the first place, although the definition of "public place" in section 138 has been interpreted by some courts to embrace a vehicle in a public place,[6] the dictum of Spence J. in *Hutt*,[7] which doubted this in the case of the section 179(1) definition, means that the matter needs to be put beyond debate. This is particularly important in the light of our formulation of clause (d) of section 171(1). We have also considered it desirable to make it clear that, for purposes of this section of the *Code*, the definition extends to doorways and hallways of adjacent premises which may not be covered by the wording "any place to which the public have access as of right or by invitation, express or implied".

What are the implications for law enforcement of these provisions, especially the recharacterization of the nuisance effects of street prostitution? First of all, the police will not be able to arrest and charge prostitutes or customers for merely being present in a public place. Nor will they be able to move against them for attempting to make contact with another individual, unless it is part of a sequence of intrusive conduct. Thirdly, they will not be able to proceed by setting up an individual prostitute or customer so that the individual makes an offer to sell or purchase sexual services. What the police will be able to do is to arrest and charge when they have sufficient evidence that the individual or individuals concerned have been guilty of more than one overture, or instance of obstruction whether to a particular member of the public or to the public in the area. This evidence can be obtained by visual surveillance, and/or by the use of unobjectionable plainclothes operations.

Given the option of visual surveillance it seems to the Committee that it would be difficult for the police to argue on operational grounds that it is easier for them to nab the prostitute than the customer. Furthermore, we are inclined to believe that the formulation which we have suggested would make it easier for the police to take proactive measures, such as warning off.

In making these recommendations on street prostitution and its adverse effects the Committee is not naive enough to believe it has found the perfect solution. There is no guarantee that the law will be systematically and evenly enforced. That will depend, as it does with any criminal law provision of this nature, on the commitment of the law enforcement authorities. We do think that the suggested amendments provide the police with an opportunity to assess the problem in a particular area, whether on their own initiative or as a result of a complaint, and to move in if it is out of hand, without resort to heavy or under-handed tactics. At the same time, it provides some leeway to both prostitutes and customers to establish their liaisons on the streets, as long as that is done discreetly. If handled sensitively, we see it as the most satisfactory vehicle for establishing a balance between the various conflicting interests.

4.2 Procuring

Recommendation 59

1. **Substitute for the existing section 195(1) the following:**

   Everyone who

   (a) by force, threat of force or by other coercive or threatening behaviour induces a person of 18 years or older to engage in prostitution with another person or generally,

   (b) by force, threat of force or by other coercive or threatening behaviour compels a person of 18 years or older to continue engaging in prostitution with another person or generally is guilty of an indictable offence and liable to imprisonment for 14 years.

2. **Repeal subsections (3) and (4) of section 195.**

COMMENTARY

The suggested formulation for section 195(1) flows from our General Recommendation 7 and our belief that conviction for procuring should be related to the use or threat of force by the procurer on his victim. As we have argued above we see no justification in affording the protection of the criminal law to adults who form relationships, which, while not considered in their best interests by others, nevertheless represent an apparently genuine choice on their part. The present law on procuring is so framed that merely persuading an adult person to become a prostitute or to engage in prostitution is an offence. It reflects the view which was dominant at the end of the 19th century that adult women were not capable of making their own decisions on career and lifestyle, and needed to be protected from the guile of licentious males.

Although we believe that women, and indeed men, still need to be protected from forcible or physically threatening conduct which is designed to have them prostitute or continue to prostitute themselves, there is no justification for any broader protection.

In recommending this much narrower provision, we are also mindful of the infrequency with which charges are laid under section 195(1). We are aware that both subsection (3), which adds the requirement of corroboration and (4), which sets out a one year limitation period for bringing proceedings, and which we believe should be repealed, partially explain this dearth of prosecutions. However, it seems to us that the occasions on which procuring comes to the attention of the police will be rare, and like living on the avails will usually only result from a person having been physically abused or threatened with such treatment.

It will be evident that the formulation which we have suggested is much shorter and simpler than the present litany of nine procuring offences. In our opinion section 195(1) in its present form represents a parade of horrors, which even at the times it was enacted and amended, were in part the product of fiction rather than fact. The detailed articulation of the various ploys of procurers in the section was a conscious response to the supposed existence of a widespread "white slavery" trade. Recent research suggests that, while individual cases of procuring and abduction did take place, the existence of a trade, let alone a conspiracy, was more a figment in the minds of crusaders than a reflection of reality.[6] We find it suggestive that clauses (c), (e), (f), (g) and (h) have not given rise to reported cases. That does not mean that prosecutions have not occurred under these clauses. However, contact with several police forces suggests the absence of reported cases is an accurate reflection of general inactivity in these areas. If there are cases of abduction of a person to induce them to engage or continue in prostitution which do not fall within the new formulation, we are inclined to believe that they will be caught by section 247.1 (kidnapping).

As we explain in the commentary on our recommendations on financial support from prostitution (see below) we recognize that the narrowed ambit of responsibility for both procuring and pimping will leave certain prostitution businesses, especially escort and dating services, free to practice their business without criminal law sanction, as long as they refrain from strong arm tactics. For the reasons set out below we accept that result, and believe that Canadian society has other legal mechanisms available to it to regulate effectively such activity.

We see no justification for retaining clauses (3) and (4) which relate to corroboration and limitation of prosecution respectively. Both seem to reflect that view that, despite the felt need to protect women from crafty and immoral males, the women themselves may not be entirely trustworthy. Rather than this fear being dealt with simply in terms of a court weighing the evidence, the Crown is required to go that further step of finding evidence, other than that of the victim, which supports the victim's story, and to do all of this within a set period of time. These requirements seem to us to be yet another unfortunate vestige of the schizophrenic male view of women as frail and helpless on the one hand, but unreliable, and even scheming on the other, which traditionally permeated the law on sex offences in Canada, and does no credit to the modern law. We therefore recommend the repeal of both those clauses.

The penalty for this offence has been increased from 10 to 14 years. This reflects the narrowed formulation and our belief that the use of violence, threat of force or coercion to induce a person into or keep them in a life of prostitution which may itself in turn be marked by violence make this a very serious offence. To our minds, it ranks in gravity with aggravated assault (section 245.2) and extortion (section 305) both of which have a maximum penalty of 14 years.

4.3 Financial Support from Prostitution

Recommendation 60

1. **Substitute for section 195(1)(j) (living on the avails) the following:**

> **Everyone who by force, threat of force or other coercive or threatening behaviour induces a person of 18 years or older to support him financially in whole or in part by acts of prostitution is guilty of an indictable offence and liable to imprisonment for 14 years.**

2. **Repeal subsection (2) of section 195(1).**

COMMENTARY

These specific recommendations again flow from Recommendation 7 that the criminal law's concern with the exploitative aspects of prostitution in the case of adults should be limited to conduct which is forcible or threatens force.

The present formulation of the living on the avails clause is, of course, much broader. Indeed, it embraces a set of relationships which include some at least which are not characterized by violence or its threat. The designation "pimp" is one which is clearly used in a very loose and imprecise fashion in Canada. It extends from the most deplorable professional and thoroughly violent individual who exploits in every way possible a single prostitute or a group of prostitutes, to husbands or lovers, who, while they benefit from the prostitution of their partners, do not subject them to force or threat thereof. In some instances, it is clear that the involvement in prostitution is a reflection of the economic hardship of a couple, and an agreement by the female partner to contribute to the family budget. The point here is not to deflect attention from the totally unacceptable nature of parasitic pimping, or even the undesirability of individuals resorting to prostitution for purely economic reasons. It is to suggest that the present provision is so broadly drawn that it embraces relationships which, it may be said, do not deserve the attention of the criminal law.

As in the case of the present procuring provision, the reality is that typically the only cases which are prosecuted with any regularity by the police are those in which a complaint is laid by a woman that she has been physically abused or threatened by a pimp. Given that fact, and the assumption, which we think is a tenable one, that other forms of relationships are consensual, we believe that the criminal law should be limited in its ambit to forcible, threatening or coercive conduct.

The adoption of a more circumscribed provision on financial support from prostitution, like that on procuring, will have the effect of removing from the attention of the criminal law a number of prostitution businesses, in particular escort and dating services, which do not provide sexual services on their premises. Normally, the services provided take place in accommodation supplied or paid for by the customer. Under the present law such operations are subject from time to time to prosecutions for living on the avails. Given our concern to see prostitution move from the streets to more discreet private settings, we think it desirable to allow some leeway to such services. We are, of course, conscious of the dangers seen in allowing any rein to commercialized prostitution. Moreover, we are aware that law enforcement authorities in some parts of the country have concerns about the involvement of "organized crime" in this business. However, any doubts which we have are resolved by the reflection that a number of municipalities in Canada have introduced extensive and demanding by-laws relating to such establishments, by-laws which have survived constitutional challenge. We believe that municipalities have demonstrated that they have the will and capacity to use licensing provisions to control such operations effectively, so that the adoption of our recommendation should not herald a period of uncontrolled, commercialized prostitution. We also note, in passing, from our survey of the yellow pages in a number of Canadian cities that, despite the present state of the criminal law, escort and dating services seem to abound. Moreover, in the event of any violence, threat of force or coercion, the criminal law can be invoked, as it can, to deal with criminal conduct which is incidental to the prostitution business, for example drug trafficking.

Because we have recommended that prosecution for being supported financially by prostitution depends upon the use or threat of force, the presumptions contained in section 195(2) are no longer relevant and therefore should be repealed.

Again, we have recommended an increase of penalty from 10 to 14 years. We believe this to be justified to take account of not only the violence, threat of force or coercion, but also the broader relationship of which it is a part. As with violent procuring, we see this offence as being on a par with aggravated assault (section 245.2) and extortion (section 305).

4.4 Prostitution Establishments

Recommendation 61

1. **Replace existing section 193 of the Criminal Code with the following provision:**

(1) Everyone who operates or aids in the operation of any place which is used in whole or in part for purposes of prostitution is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Everyone who as owner, landlord, lessor, tenant, occupier, or otherwise having charge or control of any place, knowingly permits it to be let or used for purposes of prostitution is guilty of an offence punishable on summary conviction, subject to a maximum fine of $5,000.00.

(3) This section does not apply to:

- **(a) a place of residence in which two residents of 18 years or more of age of that place engage in acts of prostitution;**
- **(b) a prostitution establishment licensed and operated in accordance with a regulatory scheme established by the provincial or territorial legislature in that jurisdiction.**

(4) Where a person is convicted of an offence under subsection (1) the court shall cause a notice of the conviction to be served on the owner, landlord, or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(5) Where a person upon whom a notice is served under subsection (4) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the place, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent a recurrence of the offence.

(6) For purposes of this section "place" includes any place, whether or not

- **(a) it is covered or enclosed,**
- **(b) it is used permanently or temporarily, or**
- **(c) any person has an exclusive right of user with respect to it.**

2. Repeal definition of "common bawdy house" in section 179(1) of the Criminal Code.

3. Repeal clauses (a) and (d) of section 180(1) of the Criminal Code.

COMMENTARY

These recommendations embody the specifics of the general position taken by the Committee in recommendations 55 and 57. In particular, they reflect the position that the activities of prostitutes and customers should not be the concern of the criminal law, unless they involve some form of criminal conduct which is independent of the agreement to engage in prostitution or the act of prostitution itself. Secondly, they flow from the belief that prostitution cannot be dealt with by the law on a piecemeal basis, but only by carefully linking the provisions on each aspect of prostitution-related activity. Moreover, they follow from the Committee's view, that, if prostitution is a reality with which we have to deal for the foreseeable future, then it is preferable that it take place, as far as possible, in private, and without the opportunities for exploitation which have been traditionally associated with commercialized prostitution.

The new section, which would replace the present bawdy house provision in section 193, drops the reference to "common bawdy house" and replaces it with the term "prostitution establishments". We make this change, because, although "common bawdy house" is broadly defined in section 179(1), it still conjures up the settled and permanent residential brothel of years gone by. There seems little point in preserving quaint terminology, when a more straightforward formulation can be used. Instead of referring to a common bawdy house, in subsections (1), (2) and (4) we propose to talk of "any place which is used in whole or part for purposes of prostitution". "Place" is defined in subsection (6) in the same terms that are currently found in section 179(1), thus preserving the widest scope for the characterization of a location as a prostitution establishment. The result of these changes is, of course, that the definition of "common bawdy house" in section 179(1) becomes redundant.

In place of the reference in the current section to "one who keeps" which, as we have seen in Part III, Chapter 29 has given rise to interpretative problems, we have substituted "everyone who operates or aids or assists in the operation of". The latter wording connotes much more clearly the combination of control and management which is required. This should rule out criminal responsibility for an owner where a prostitute or prostitutes uses a facility without his or her knowledge.

With the repeal of the existing definition of "common bawdy house" and the terminology used in the new formulation of the section the focus will be exclusively on establishments in which prostitution is practised. We have dropped all reference to "the practice of acts of indecency". This terminology harkens back to days when all sorts of sexual practices which were not in the limited glossary of respectable society were considered immoral and indecent. As we have noted in our analysis of the present law in Part III, Section II, Chapter 29, it has been used by the police to harass various gay establishments in which sexual activities between adults take place without payment. This change accords with the recommendations of the Badgley Committee that section 155 of the *Criminal Code* (buggery) and our own recommendation on children that section 157 (acts of gross indecency) be amended to limit their effect to acts on persons under the age of 18, and that section 158 which allows a limited defence to charges under both sections 155 and 157 be repealed.[9] The effect would be to leave such acts or practices by consenting adults outside the reach of the criminal law.

We have recommended a maximum fine of $5,000.00 for the "permitting" offence in subsection (2). We think that this is justified to allow the courts to deal resolutely with the owner or landlords, etc. who wilfully turn a "blind eye" to extensive prostitution activity on their property.

Subsection (3) of our recommended section embodies our belief that some leeway should be allowed by the law to one or two prostitutes to use their shared residence for the purpose of providing prostitution services, and to small-scale non-residential commercial prostitution establishments should the provinces and territories desire to establish a proper regulatory scheme to license such places.

The existing definition of "common bawdy house" is broad enough to include a single prostitute using a residence for prostitution. It is our belief that it is preferable for prostitution to take place in private than in public. Apart from commercial prostitution establishments, the only realistic settings in which private acts of prostitution can take place are the residence of the prostitute, or the residence or accommodation of the customer. The latter are typically not touched by the existing law. We do not see why the former should be, and readily conclude that the law should no longer penalize one adult prostitute operating out of that person's residence.

We have considered whether the exemption might extend further. The Criminal Law Revision Committee in England, in its 1982 report, raised the possibility of extending the present exemption from prosecution for one prostitute operating out of a residence to two.[10] This, that Committee felt, might make it more attractive for prostitutes to use private premises, because they would be able to provide each other and their families with mutual support and help. The result might be to induce some prostitutes to move off the streets. The English Committee was not willing to extend the number beyond three lest "nests of prostitutes" be encouraged. We agree with the reasoning used by the Criminal Law Revision Committee for allowing a two person exemption for residential premises. We agree as well with their concern about "nests of prostitutes". In particular, we wish to avoid a situation where an exception designed to benefit the individuals really just encourages commercial operators to collect people together in a *de facto* commercial establishment. For the same reason, we have limited the exception to a residence, more particularly to the prostitute's own residence.

We hope that, for some prostitutes this sort of arrangement may provide a way of operating without being beholden to pimps. In that context, we note that in countries such as Holland and Denmark where small groups of prostitutes have been allowed to operate together out of a residence, or even a small business establishment, the result has been a diminution in the influence of pimps. We recognize that there is the potential in this recommendation for friction between the prostitute and neighbours. We do not wish to underemphasize the neighbours' interest in quiet enjoyment of their premises. However, we think that the landlord and tenant law of the provinces rather than criminal law, is the more appropriate vehicle for dealing with conflict problems. Initially, we recognize, it may be necessary to monitor closely the provincial law to see that it is sufficiently responsive.

We are aware that once residential activities are taken out of the *Criminal Code* they may become amenable to regulation pursuant to provincial jurisdiction. Some municipalities will doubtless regulate entirely in good faith, acting from motives like a desire to deal evenhandedly with prostitutes and others who operate businesses in their residences. However, it is not fanciful to suggest that some municipalities will use by-laws, especially zoning by-laws, to prevent prostitutes from operating from a place of residence. Whether the municipality acts for good or bad motives, any move to require business licences of prostitutes may come very close to a registration system, and is of concern on that ground alone. Accordingly, we do have some doubts about whether the residential exemption will actually achieve the objectives we had hoped it would.

We are not, however, abandoning the one, or two, person exemption. In many cases and many places, it may work well. The concerns above have, rather, led us to explore what we think of as another method for achieving the goals of moving prostitution to a private location while minimizing exploitation of the prostitutes themselves. That method is the commercial prostitution establishment. As we have stated above, we believe that the criminal law should not foreclose the option for a province to embark on a scheme of licensing and regulating this sort of establishment.

There are a number of reasons for exploring this option. If we follow logically our concern to see prostitution move off the streets into private settings, then there is no reason why we should stop at protecting escort services and residential prostitution activities from the reach of the criminal law, as these activities certainly satisfy the private settings requirement. Moreover, if an effective system of regulation can be mounted and applied, there is reason to expect that such establishments can be run safely, with a concern for the welfare of both prostitutes and customers, and in locales in which disturbance to residential accommodation is precluded. The experience in Holland and Denmark is that within a regulated system it is possible for prostitutes themselves to run their own businesses. The localization of prostitution in known premises should also make it easier for the police to monitor and control the situation.

On the other hand, we are aware of the risks which would characterize any attempt to allow the commercialization of this sort of activity. The operation of a commercial prostitution establishment is not the sort of business venture which can be expected to attract respectable control or investment, at least not in North America. Cultural patterns here are different from those in the European countries where such establishments operate in apparent harmony with their surroundings. Even with the strictest of rules concerning ownership, there are always strategies whereby sinister interests can control such enterprises through "respectable" fronts. While in theory the exemption might open up the prospect of a "cottage industry" operated and controlled by the prostitutes themselves, in reality the business may well be controlled by those who have the resources to purchase and develop property and both an instinct and capacity for survival, the commercial exploiters. It is questionable, moreover, whether the existence of such establishments will reduce significantly the street prostitution population. There are some who because of habit, appearance, or inclination, will not want to work in commercial establishments, or be accepted there.

Even this summary of some of the arguments for and against the commercial establishment gives some idea of the complexity of the issue, and the considerable implications of any decision to embark on such a scheme. Because of this complexity, and the constitutional realities of Canada, we have avoided the option of using the *Criminal Code* to regulate prostitution establishments. We are aware that the *Criminal Code* contains extensive provisions which have the effect of regulating both gun use and gambling. However, we also realize that the reforms which led to the inclusion of these provisions were made only after achievement of a significant measure of agreement between the federal and provincial governments on how to control these activities. As far as we know there has not even been discussion, let alone agreement, on whether and how off-street prostitution premises might be regulated. For the federal government and Parliament to foist such a system on the country would be, to put it mildly, a disastrous political move.

Instead of recommending a federal initiative here, we have opted for a *Criminal Code* clause which allows an exemption from the general proscriptive provision on prostitution establishments if, and only if, the provincial legislature has approved a regulatory regime under which such establishments may operate subject to control. This, we feel, recognizes that under the Constitution it is the provinces which have the power to regulate business within their borders. Moreover, it allows each province to discuss and decide whether as a matter of social policy it feels comfortable with a regulated system of prostitution establishment within its domain. Thirdly, it establishes primary responsibility for both political decision making and legal control with the provincial authorities and legislature.

Having opened up the possibility of regulated prostitution establishments operating within the law, we think it worthwhile listing the type of conditions which would be necessary to any such system of regulation. These reflect in part the product of our own thinking, drawn from comments at the public hearings and the application to this situation of the principles enunciated at the outset of this Report. We have also benefitted from considering the scheme recently introduced in the State of Victoria, Australia.[11] While we recognize that the Australian constitutional system is easier to work with when it comes to blending criminal law and administrative regulation, as both matters lie within the jurisdiction of the individual states, we believe that the regime set up in the State of Victoria to regulate brothels has some features which could fit into a provincial scheme in Canada.

In our opinion any regulatory scheme for the operation of prostitution establishments would have to contain in the first place a provision forbidding employment in such establishments of persons 18 years and younger. We take the view that such establishments should be small-scale and non-residential. The large, residential Mustang Ranch in Nevada was often cited to us in the course of the public hearings as the epitome of exploitation, and we have no wish to recommend that Canadian authorities become involved in endorsing any such operation. We recall to mind in this connection that many of the apparently dated provisions of the present *Code*, related to procuring, originated because of the perceived danger that residential premises lead to exploitation. It would be inconsistent to repeal these while recommending the innovation of a residential establishment.

It will be important to prevent concentration of these facilities in one area; to limit their location to strictly industrial or commercial zones; and to distance them from churches, schools and hospitals. All of these factors, of course, relate to the concern for nuisance which has motivated our other recommendations about prostitution. As we are concerned that both prostitutes and customers are protected while using the establishments, the full range of provincial legislation relating to public health, labour standards, and workers' compensation should be extended to them. It will also be necessary to establish clearly the operating conditions under which such an establishment can be run, with provisions as to numbers, hours of operation, facilities required, records to be kept and so on.

A public approval process will have to be established which allows for a full examination of applications; vetting of applicants; and input by the public. Control of more than one establishment by a single individual or other interest should be prevented, and anyone convicted of an indictable offence or offences should be excluded from the operation or management of such establishments. The police should be provided with adequate legal means of seeking entry to such establishments and investigating the operations where reasonable grounds exist to believe that criminal activity is taking or has taken place, or that a breach of the conditions of operation is occurring or has occurred. Finally, stiff penalties need to be established for the breach of the conditions under which a prostitution establishment can be operated.

Having recommended that the issue be left to provincial initiative, we do not wish to give the impression that the federal government has no role to play here. In the first place, the provision we have recommended requires involvement of the criminal law when a prostitution establishment does not operate under or in accordance with a provincially approved regulatory regime. Secondly, we see this report as having an important function in raising the consciousness of all Canadians about prostitution, its incidence and causes, and desirable social and legal strategies to deal with it. In our minds, prostitution has been accentuated as a social problem because as a society we have chosen to "sweep it under the rug". We hope that one of the results of this report is that it will stimulate greater discussion and debate on prostitution. Both the federal and provincial governments have, we feel, a key role to play in this process of engendering frank and full debate, and we hope that the question of the desirability and feasibility of allowing regulated prostitution establishments within the provinces will be seriously discussed by the federal Minister of Justice and his counterparts within the provinces.

We appreciate that what we have recommended in the way of an amendment to the *Criminal Code* by no means ensures that Canada will move in the direction of a system of regulated prostitution establishments. We are aware that, for many Canadians, regulated prostitution establishments are an anathema. However, we feel that, for the reasons adduced, this option should be put into the policy review process with the other means we have outlined above for removing prostitution from the street to a safe, non-exploitative environment. We hope that readers will sit back and reflect a little on whether what we suggest *may*, along with our other recommendations, achieve somewhat more in terms of positive social results than the present ill-tuned and ineffective system. In particular, as we have stated earlier, we hope that the recommendation will stimulate full, frank and reasoned discussion between the federal and provincial governments.

Subsections (4) and (5) of our proposal are retained from the existing section 193, and are, we believe, necessary to underline the responsibility of owners, landlords, lessors, tenants or occupiers to take the necessary remedial action when they find that their premises have been used for purposes of prostitution. In the absence of such action, and the continuation of the activity we see no difficulty in the law "deeming" the owner, landlord etc. to operate or assist in the operation of the establishment. Given the clear notice requirement this does not seem to us to offend the *Charter* in any respect.

It will be noted that no reference is made in the formulation of the new section to inmates of such establishments or those "found in" them. The omission means that being an inmate or "found in" will no longer be an offence. The change reflects our belief that the prostitution-related activities of both prostitutes and customers should be decriminalized.

The removal of inmates and "found ins" from the concern of the criminal law makes the presumption now used in paragraph 180(1)(d) of the *Code* redundant. That clause presumes that a person is an inmate or "found in" of an establishment where the keeper has been found guilty of running a common bawdy house. Paragraph 180(1)(a) of the present *Code*, which presumes the character of a disorderly house from the fact that an authorized peace officer is wilfully prevented from entering is, in our opinion, offensive to paragraph 11(d) of the *Charter*, the presumption of innocence provision. As we have pointed out in Chapter 32, Canadian courts have already made it clear that "reverse onus" clauses such as this will be struck down under the *Charter* if there is no rational connection between the actual and presumed fact. This particular clause clearly makes an association between an actual and presumed fact which has no rational basis.

We have recommended the repeal of section 194 (transporting a person to a bawdy house) for two reasons. In the first place it is so broad in its ambit that it embraces casual conduct which is by any standards unexceptional, for example, randomly directing a passerby to a bawdy house. Secondly, there is no evidence that it is used on anything other than a very infrequent basis. The reasons for this lack of use is probably the absence of any consistent pattern of conduct which could be described as touting. Undoubtedly, there are taxi companies, taxi drivers, desk clerks, barmen and others who benefit to some extent from the trade, and who might be said to encourage it indirectly. It is doubtful, however, that this type of activity generates a significant portion of their income, and it cannot be said that they are involved in the same way as the operator of the prostitution establishment, the pimp or procurer.

5. Miscellaneous Recommendations

There are several miscellaneous recommendations we wish to make which either flow from or tie in with those set out above. Three of these represent recommendations for repeal or specific examination of other sections of the *Criminal Code* and one addresses Canada's performance on prostitution at an international level.

We agree with the recommendation of the Badgley Committee that section 155 of the *Criminal Code* (buggery) should be amended so that it is limited to such conduct with a person of less than 18 years of age.[12] An offence would accordingly not exist in the case of such conduct taking place between adults. Furthermore, we favour amendment of section 157 (gross indecency) so that it will apply only to conduct with a person of less than 18 years and the repeal of 158 (the exception to 155 and 157 for consensual acts in private between husband and wife, and any 2 persons of 21 years of age and over). The effect of these changes would be to remove from the reach of the criminal law consensual sexual conduct between adults in private, whatever the number of participants.

While we are aware that these sections have not been utilized in the case of adult prostitution, they clearly could be so used. Section 155, insofar as it applies to adults in consensual settings outside the scope of section 158, and 157 both offend the notion that adult sexual activity in private should not in and of itself be the concern of the criminal law. Moreover, unless the changes suggested are made, there will be an obvious inconsistency with what we have recommended in relation to prostitution establishments, i.e. the dropping of the current reference to "the practice of acts of indecency".[13] The presence of this inconsistency would raise the spectre of section 155 and 157 being used to do what a new section on prostitution establishments could not do.

Recommendation 62

1. **Amend sections 155 and 157 of the Code, so that they no longer extend to consensual acts between those of 18 years or older.**
2. **Repeal section 158 of the Criminal Code.**

We are also of the view that the meaning and scope of section 176 of the *Criminal Code* needs to be clarified. As we have indicated in our discussion of the common nuisance section in section II, chapter 30, we believe that the present wording reflects the reality that not only is there a *Criminal Code* offence of common nuisance, but also a broader residual notion of common nuisance, which, insofar as it does not overlap with the *Code* offence, can be pursued by the Attorney General of Canada, or of a province, seeking a civil injunction. This view accords with that voiced in the commentary on section 176 (then 165) by J. C. Martin in the 1955 edition of *Martin's Criminal Code*.[14] Mr. Martin was research counsel to the *Royal Commission to Revise the Criminal Code* which reported in 1952. This commentary relates the earlier more detailed statement of common nuisance in the *Code* to its truncated form in the 1953-54 revisions to the *Code*. The commentator concludes that the criminal process for dealing with common nuisance is limited to acts "endangering the lives, safety, or health of the public, or causing physical injury to any person" by section 176(1), but implicitly recognizes the right of the Attorney General of Canada or the provinces, as is appropriate, to use the civil injunction to restrain other forms of common nuisance, for instance, interferences with "the property or comfort of the public" or "the obstruction of the public in the exercise or enjoyment of a right that is common to all subjects", which are the additional and residual forms of nuisance mentioned in section 176(2).

Although we are confident of our ground here, it is only because we had the advantage of reviewing the historical analysis mentioned above. The section itself would not necessarily lead to this conclusion. Indeed, we note that in the two recent cases in which the issue of the "right" of a provincial Attorney General to seek an injunction to restrain the activities of prostitutes as a common nuisance, no analysis was made of the meaning and scope of section 176.

More troubling is the fact that the judges reached opposite conclusions on the question of whether, or at least to what extent, the Attorney General of a province has the power claimed. Chief Justice McEachern in *Attorney General for British Columbia* v. *Couillard*[15] seems to have evinced no doubts about it, while MacIntosh J. in *Attorney General for Nova Scotia* v. *Beaver*[16] concluded that the attempt to exercise such a "right" in that case constituted a usurpation of the federal criminal power. It may be that both judges have a point. As we have said, there is every reason for contending that the provincial Attorney General has the power to seek a civil injunction to restrain one of the species of common nuisance which falls outside its criminal, i.e. section 176(1), definition. Although the effect of this may be to exact a penalty from the defendant for contempt if he fails to comply, the process does not seem in and of itself to infringe upon the federal jurisdiction over criminal law. However, it seems that Parliament has added specific common nuisance offences which go beyond the limits set out in section 176(1). It is arguable, for instance, that section 195.1 (soliciting) is an example. So presumably would be section 171 (causing a disturbance), both in its present form and with the amendments which we have suggested. What is the effect of a provincial Attorney General seeking a civil injunction against conduct which is the subject of a provision like sections 195.1 or 171 in the *Criminal Code*? Is the Attorney General usurping the criminal law (as Mr. Justice MacIntosh suggests), or aiding it (as Chief Justice MacEachern suggests), or can he be seen as legitimately pursuing a civil remedy, which can co-exist with whatever criminal provisions there are which could be said to cover the same substantive ground?

As both judges seem to have agreed, there is little doubt in England about at least part of the answer. The English courts, including the House of Lords, have made it clear that in pressing circumstances, the Attorney General can invoke the power to seek a civil injunction to aid the criminal law.[17] An obvious example would be where convictions for breaches of the criminal law by, and the penalties applied to, an individual or group of individuals, have no effect in stopping the criminal conduct in question. The answer is not so clear cut in

Canada because of the division of powers. If the provincial Attorney General wearing a civil hat enters where the provincial Attorney General wearing a criminal hat fears (or is unwilling) to tread, is that individual usurping the criminal law power? We are not sure we know the answer. What we do know is that discussion needs to take place between the federal Minister of Justice and his provincial counterparts on this issue. In the absence of a natural appeal in either of the two cases mentioned, it may be that the issue can be resolved by a reference to the Supreme Court of Canada. Alternatively, the two levels of government may wish to seek some sort of legislative accommodation. We think that the uncertainty here needs to be resolved.

Recommendation 63

> **In view of the uncertainty which surrounds the meaning and purpose of section 176 of the Criminal Code, and the confusion over the relationship between the nuisance provisions in the Code and the power of an Attorney General of a province to seek a civil injunction to restrain a common nuisance, the federal Minister of Justice and his provincial counterparts should, if necessary, make a reference of this issue to the Supreme Court of Canada, or seek a legislative solution to the problem.**

Although section 253 of the *Criminal Code* (communicating venereal disease) has a theoretical scope which is much broader than the context of prostitution, we believe that it should be repealed. As we have concluded in section II, chapter 30, it is hopelessly outdated in the etiological assumptions it makes; it clearly does not reflect modern knowledge on, or practice in relation to, sexually transmitted diseases (STDs). Secondly, the evidentiary requirements are so daunting that the section has almost never been used. We note that the Badgley Committee came to the same conclusion,[18] and that Bill C-19, introduced by Minister of Justice MacGuigan in 1984, would have removed it from the *Code*. We agree with the Badgley Committee that effective initiatives to combat and treat sexually transmitted diseases lie in the field of improved public health practice and administration.

Recommendation 64

> **Repeal section 253 of the Criminal Code.**

In considering Canada's record in the context of international initiatives to deal with prostitution, we were surprised to discover that this country had (a) not become a party to the 1951 *United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*; and (b) voted against the most recent attempt by the U.N. to stimulate action by states to combat prostitution. As we have hinted in the text in Chapter 33, we are not impressed with the official argument that the failure to ratify the 1951 *Convention* reflects the reality that the instrument was merely a consolidation of previous agreements to which Canada *is* a party. That argument is suspect because the 1951 *Convention* does include new elements; for example, the first reference to male prostitution in such a convention. We believe that the reason has more to do with the feared constitutional ramifications of ratifying an international agreement on matters which fall partly within provincial jurisdiction. The result, we understand, is that because the *Convention* is not ratified by Canada, no pressure is put on either the federal or provincial governments to explain how far their law and practice match the aspirations contained in the *Convention*. We find it ironic that this reticence should exist, when Canada took a leading role in the drafting and passage of related convention, that on the *Elimination of All Forms of Discrimination Against Women* of 1979. That agreement clearly overlaps with the 1951 *Convention* in that it calls for the repeal of laws discriminating against women by prostitution, and like the latter, has implications for both the federal and provincial levels of government in Canada. We have learned that in the case of the 1979 *Convention* both federal politicians and civil servants displayed considerable energy and enthusiasm in seeking federal interdepartmental and provincial agreement, thus allowing Canada to take a leadership role.

We do not understand the Canadian position on General Assembly Resolution 38/180 of February, 1984 which we described in Chapter 33. This resolution did no more than call for the use of humane efforts, including legislation, to combat prostitution, and to provide protection to the victims of prostitution by education, social guarantees and employment opportunities for them. While the preamble certainly emphasized the control of female prostitution, we do not think that the explanations given by the U.N. for the emphasis were unreasonable at that time.

We are of the opinion that Canada must engage in a serious review of its position vis-à-vis both the 1951 *Convention* and more recent initiatives by the United Nations. We are aware that certain of the recommendations we have made, if adopted, could be seen as contradicting the objectives of these international agreements and resolutions, more particularly those on procuring, pimping and the operation of prostitution establishments. We do not believe, however, that viewed in the broader context of a strategy which tries to blend long-term social and shorter term legal strategies, they are inconsistent with a humane approach to prostitution, which looks forward to a significant diminution in the incidence of this social phenomenon. However, whether or not Canada would feel welcome to ratify the 1951 *Convention*, any decision not to do so must be made and justified on grounds of principle, rather than expediency. Moreover, if the Canadian view is that the United Nations is taking too narrow or too facile a view of the problems of prostitution, then this country should, consistent with its performance on other initiatives of this type, be prepared to argue its case frankly in terms of the principles it considers appropriate and valid, rather than relying on arguments which give the impression of being specious.

Recommendation 65

Canada should review its position on its failure to become a party to the 1951 United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and its low profile international stance on prostitution and how to deal with it, in general; in particular, if it takes issue with some of the prescriptions of the Convention, or future resolutions of international bodies on prostitution, then it should be on grounds of principle rather than expediency.

Footnotes

[1] There are a number of examples already in this country. Inter-governmental initiatives in the research field, which are complemented by funding from private foundations and corporate sources, are a common means of encouraging new research endeavour.

[2] See Part III, Section III, Chapter 36.

[3] See *R* v. *Di Paola* (1978), 4 C.R. (3d) 121 (Ont. C.A.); *R* v. *Dudak* (1978), 41 C.C.C. (2d) 31 (B.C.C.A.).

[4] *R.* v. *Hutt*, [1978] 2 S.C.R. 476.

[5] *R* v. *Galjot and Whitter* (1981), 64 C.C.C. (2d) 1 (S.C.C.).

[6] *R.* v. *Wise* (1982), 67 C.C.C. (2d) 231 (B.C.Co.Ct.); *R* v. *Figliuzzi* (1981), 50 C.C.C. (2d) 144 (Alta Q.B.); *R.* v. *McEwen* (1980), 4 W.W.R. 85 (Sask. Prov. Ct.).

[7] *R.* v. *Hutt* (1978).

[8] See M. Conolly, *The Response to Prostitution in the Progressive Era* (Chapel Hill: University of North Carolina, 1980); J. Walkowitz, *Prostitution and Victorian Society: Women, Class and the State* (Cambridge: Cambridge University Press, 1980).

[9] The Badgley Report at 46-8 and 63.

[10] Criminal Law Revision Committee, *Working Paper on Offences Relating to Prostitution and Allied Offences* (1982), Home Office, London, H.M.S.O. at 19-22.

[11] See Part III, Section III, Chapter 35.

[12] Badgley Report at 54.

[13] *Ibid.*

[14] *Martin's Criminal Code*, 1955 (Toronto: Cartwright & Sons Ltd., 1955).

[15] *Attorney General for British Columbia* v. *Couillard* (1984), 14 C.C.C. (3d) 169 (B.C.S.C.).

[16] *Attorney General for Nova Scotia* v. *Beaver* 19 Dec. 1984, unreported (N.S.S.C.).

[17] *Gouriet* v. *Union of Post Office Workers*, [1977] 3 All. E.R. 70 (H.L.).

[18] Badgley Report at 63-4.

Part IV

Children

Chapter 41

Introduction

The mandate of this Committee includes a consideration of pornography and prostitution as they relate to children and young persons. In this part of our Report, we focus particularly on children and young people. A number of considerations have led us to this decision to gather our observations on children and young people into a single part of the Report, rather than dispersing them throughout the other chapters.

At the outset of the Report, we enunciated a number of principles which have guided us in formulating our recommendations, and which we believe should provide the foundation of legal action in these two areas. These principles are equality, responsibility, individual liberty, human dignity, and appreciation of sexuality. From the discussion in that chapter, it is apparent that many of these principles have applications to children and young people which differ from their applications to adults.

We do not, for example, consider that the principles of individual liberty and responsibility can be applied to children to the same extent as they can to adults. Children may well have valid claims to autonomy in wide ranges of conduct. However, the liberty to engage in behaviour which is regarded as harmful will be withheld from children with more frequency than it is withheld from adults. Various justifications may be offered for this. The child may be too young or inexperienced to appreciate the harmfulness of the behaviour, or its nature or extent. In addition, quite apart from the characteristics and maturity of the individual child, adult society may be protective of the state of childhood, which is seen as a time, firstly, for the enjoyment of innocence and, then, gradually, for development out of innocence. The exposure to certain kinds of influence or behaviour may be seen as a disruption of the valuable process of gradual maturation.

Of course, not all the reasons offered in support of restraining youthful autonomy or liberty are good ones. Nor are all the restraints imposed, even in the name of sound reasons, reasonable restraints. In the case of pornography and prostitution, however, we think that there is strong justification for treating children as vulnerable, and effecting some decrease in their liberty.

While viewing children and young people as vulnerable, we do not propose that it always be the state which serves as their protector. There is, to be sure, a clear role for the criminal law in deterring the most seriously offensive types of behaviour exploitative of young people, and for other legislation in regulating the impact of other kinds of behaviour. Social resources should, where appropriate, be deployed to assist young persons to cope with difficult situations. However, in our efforts to ensure that the state assumes its proper share of responsibility for the vulnerable, we do not intend to ignore the primary role which the family will play in guiding and assisting the young person. The family is, in fact, the child's first source of comfort, education and guidance.

Many of the recommendations which we make recognize the valuable role of the family and are intended to assist the family in performing that role. So, although we do see some diminution of the child's liberty of action as a necessary part of a proper regime to deal with pornography and prostitution, we do not contemplate that such diminution will always be a compulsory one, at the hands of the state. Nor do we wish to include in our plans any substantial diminution of parental responsibility toward their children and parental liberty to raise and educate them according to their own moral criteria. Our concern about state censorship of the media, for example, stems directly from our desire that families, rather than the state, be the principal influence on the child's developing tastes.

Although the principles of personal liberty and equality may have more restricted application to young people than to adults, we take the view that young people may often be as subject to the principle of responsibility as are the adults. In particular, youths who exploit other young people should be called to account for such conduct. There is little justification for allowing a theoretical concern with youthful vulnerability to assist in the creation of a new youthful type of predator. In this connection, we are very interested in the approach embodied in the *Young Offenders Act*[1].

The "Declaration of Principle" in that *Act* recognizes that although society has the responsibility to take reasonable measures to prevent criminal conduct by young persons, it must nevertheless be afforded the necessary protection from illegal behaviour. The Declaration also states that while young persons should not, in all instances, be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions. Also recognized with respect to the disposition of youthful offenders is the principle that young persons who commit offences require supervision, discipline and control, but because of their state of dependency and level of development and maturity, they have special needs and require guidance and assistance.[2]

The procedures provided in the *Young Offenders Act* to govern the trial and sentencing of youthful offenders, reflect this idea of responsibility tempered with accommodation to the special circumstances of the child.

Because of the availability of the *Young Offenders Act* to govern proceedings against young persons charged with offences, we are content that young people should take responsibility for their actions. However, we think that this responsibility should be the modified responsibility expressed in the *Young Offenders Act* principles.

We also believe that it is important for this Committee, and legislators, to focus more precisely not only on the differences between adults and young persons, but also on the similarities between them. For example, young people, like adults, have a need for recognition of their sexuality, and for ways in which to express and explore it without doing harm to themselves or others. They are, like adults, capable and desirous of artistic expression. Most importantly, they too are beings with dignity and integrity. All of these characteristics should, in our view, have a bearing on the response of the legal system to children and young people, just as the particular vulnerability of children should be recognized.

For purposes of our discussion, we consider all those under the age of 18 to be young people, and thus distinct from those we deem adults. There is still some variation in the "age of majority" across Canada, with ages other than 18 being the norm in some jurisdictions for purposes like consumption of alcoholic beverages, or driving. The age of leaving school is commonly less than 18, as is the age at which children are considered free to withdraw themselves from parental control. However, 18 is a significant age for many purposes related to majority in many jurisdictions. It is also, in our view, significant that the *Young Offenders Act* defines young person as a person under 18 years of age. There do not appear to be significant reasons for our recommendations to depart from the age of demarcation chosen for this recent and substantial reform of the juvenile justice system.

Footnotes

[1] S.C. 1980-81-82, c.110, proclaimed in force April 2, 1984.

[2] S.C. 1980-81-82, c.110, s.3(1)(b), 3(1)(a), and 3(1)(c).

Chapter 42

Pornography and Prostitution Involving Children

It was very evident at the public hearings that there were major and deeply felt concerns for children and young people in relation to pornography and prostitution. Important among them were concerns about the actual involvement of children in the production of pornography and as prostitutes, and the access and exposure of children to sexually explicit materials, which were considered to be inappropriate given the level of maturity of children and young people. It was impressed upon the Committee time and time again, that young people should be protected from the worst aspects of commercial sexuality and allowed the opportunity to reach adulthood without being subjected to corrupting or distorted views of human sexual relations. The Committee could not fail to be impressed by the sincerity with which groups and individuals made their arguments. There is no doubt in our minds that Canadians from coast to coast see the needs and rights of children and young people to be quite special and deserving of most particular attention.

While the Committee could not doubt the intensity and sincerity of the feelings and arguments made to it, it was apparent that much of the evidence put forward in support of these concerns was problematic. As we have indicated elsewhere in the Report, information on pornography and prostitution in Canada is sparse. This state of affairs certainly characterizes the information available with respect to children's involvement in these areas. Not suprisingly, therefore, those presenting briefs had to draw on research which is often less than satisfactorily carried out, which may report on experiences in other countries with different social and legal systems, or which speaks only to very particular instances of pornography or prostitution. Thus, while the Committee shares and supports the concern of those who urged us to protect children, we do not always find ourselves able to agree with the descriptions put forward as reflecting the current situation with respect to child pornography and prostitution in Canada.

1. Concerns Expressed at the Public Hearings

A number of very basic issues relating to children were identified in the course of submissions at the public hearings.

In the area of pornography, great concern was expressed at the perceived increase in the production and dissemination of child pornography. Where children were concerned, there was perceptibly less tolerance of certain kinds of material which might have been tolerated were the subject an adult. For example, some people appearing at the hearings considered unacceptable a photograph of a nude child, by himself or herself, even though the representation was not explicitly sexual. Mere nudity in photographs of adults was much more widely tolerated.

From the concern about child pornography stemmed recommendations for stiffer measures against those making, disseminating, or using this material.

Exposure of children to pornography, whether of the child or adult type, similarly attracted the concern of the public. There were many aspects to this concern. We were told of children being unwittingly and unwillingly exposed to offensive material, whether through the newsstands in a local variety store, an improperly or inadequately labelled videotape, or television broadcasts reaching the home receiver during family viewing hours. We were also told of young people seeking out material which their elders considered offensive or dangerous, either for amusement or, perhaps more troubling, as a way of trying to understand their own developing sexuality where less harmful methods were not readily available. The brief from the YWCA in Yellowknife summarizes very well the concerns which we heard, from groups in the south as well as the north:

> Children growing up in Yellowknife are fairly unsophisticated, by southern standards, in terms of their exposure to a variety of attitudes and lifestyles. In the last few years, Yellowknife has been inundated with material of a pornographic nature. It concerns the YWCA that the first introduction of young people to sexuality might very well be of a pornographic nature. As with parents everywhere, many Yellowknife parents do not for whatever reason, address the issue of sexuality with their children. We do not have sexual education classes in our schools in Yellowknife. For these reasons we at the YWCA are deeply concerned that our young people will be exposed to material which depicts sexuality in a degrading, violent and unhealthy manner, and that our young people will consider this to be an acceptable expression of sexuality.
>
> Repeated exposure to pornographic material, we fear, will have the effect of desensitizing children to the true nature of sadistic violence...
>
> The YWCA of Yellowknife is concerned that such desensitization of children will negatively affect the development of a healthy sexual self-image and attitudes of both boys and girls, and will negatively affect the development of healthy and satisfying sexual relationships of both young men and women.
>
> We are also concerned that the very presence of pornographic material suggests that the behaviour depicted in this material is condoned by our southern society. This may be interpreted as the norm and thus form the basis for standards of community acceptability, both by southern and other cultural groups in the north.
> *YWCA, Yellowknife*

With respect to prostitution, one of the major concerns of witnesses was how to prevent young people from taking up prostitution; similarly, finding ways of enabling or encouraging them to leave prostitution was a priority. Criminalizing the street prostitution activities of young persons was seen by some as a way of deterring prostitution or breaking the tie between the youngster and this way of life. There was, however, significant recognition that criminalizing these activities was at best a superficial solution, since the reasons why young people become prostitutes can be very complex. Without adequate support services for runaway youths, for victims of sexual or emotional abuse in the home, or for young people trying to leave prostitution, merely laying a criminal charge against the child would not be effective and could indeed be harmful. As the Centre de Services Sociaux Ville-Marie in Montréal pointed out:

> ...juvenile prostitutes are not a homogeneous group. Some are beginning their careers as prostitutes, some want to stay in prostitution, others want out. Some are involved in prostitution purely for economic reasons, some because the choices made available to them by others have been so unattractive that prostitution seems to be the best alternative. Still others are involved in prostitution because of their experiences of abuse and neglect. They are motivated by the ever present hope of having both their past, unmet psychological and material needs met.

The idea that such a diversity of problems can be addressed solely within the context of the criminal system did not find general support.

Special problems involving young people in the area of street prostitution were identified in the public hearings. Once young people have run away from home, they are faced with the problem of providing at least the basic necessities of life for themselves. Whether or not their original intention was to become a prostitute, they frequently find this their only option and move into the business. Too young to enter licensed premises or rent apartments, too young and often too ill-trained to get regular employment, young people are showing up in street prostitution in significant numbers. Thus, in those areas and districts where public impatience with prostitution is likely to be at its highest because of the public nuisance which is often involved, the juvenile prostitute population may be particularly vulnerable.

Throughout the submissions in both areas of our mandate, there emerged a strong recurring theme. This was the recognition that young people who engage in prostitution or use or see pornography are often merely the victims of adults. Certainly, the market for the services of the young prostitute, male or female, is largely an adult market, as is the market for child pornography. The merchants and entrepreneurs, whether they be the variety store owner, publisher, or pimp are for the most part adults. The briefs at the public hearings were very clearly in favour of bringing responsibility for children's involvement in these activities home to the adults who are the precipitating factor in it. This desire to focus on the adult market, or the adult actor in a transaction, took precedence over any inclination to penalize the child or young person. Measures aimed at eradicating what was clearly seen as exploitation were a high priority with those who made presentations to us.

Implementation of measures and programs for young people was a corollary to the desire for measures aimed at adult exploitation. The desirability of having positive sexual images and good erotic literature available to young people exploring their own sexuality was a recurring theme in the hearings. Sex education by parents and educators was often cited as crucial not only in diverting young people from becoming a market for offensive materials, but also in helping them to be a critical audience for what they do see in the mass media. Supportive programs for youngsters dealing with difficult home or street situations were described, and praised. Unfortunately, all too often, we heard of good programs which were falling victim to government austerity drives.

In addition to the many submissions we received concerning legislative reform and social and educational measures, there were comments about a disturbing cultural phenomenon underlying the overt manifestations of pornography and prostitution. It was pointed out many times that images in the media are increasingly depicting children as sexual objects in order to sell products. Ads showing young girls bare to the shoulder, made up and coiffed like courtesans to display perfume, and an ad for a man's shirt featuring a little girl bare to the waist level, were submitted to the Committee. These, and others using infantile sexuality to sell products, are subject to no control whatever, and form part of what many briefs described as an atmosphere of increasing tolerance of the sexual exploitation of children. As one brief argued:

> The message of "kiddie porn" is echoed everywhere... the image of eroticized childhood has permeated our culture—it pervades film, advertising, popular culture.
> *Women Against Pornography, Victoria*

2. Research Findings

Information with respect to children and pornography and prostitution in Canada comes from two major sources: the Report of the Committee on Sexual Offences Against Children and Youths (Badgley Report)[1] and the program of research completed for the Department of Justice in support of the work of this Committee.

The Badgley Committee on Sexual Offences was established with a specific mandate to investigate:

> ... the incidence and prevalence of sexual abuse against children and youths, and their exploitation for sexual purposes by way of prostitution and pornography. In addition, the Committee is asked to examine the question of access by children and youths to pornographic material.[2]

The Badgley Committee has, therefore, completed a wide-ranging review of all aspects of these issues as they relate to children. As part of its work, the Badgley Committee undertook an extensive program of research. This has provided us with a very up-to-date and comprehensive analysis of children and pornography and prostitution, and we have relied heavily on this committee's research in developing our understanding of the issues. The research commissioned by the Department of Justice for this Committee was not focused specifically on children. Nevertheless, relevant information was obtained in many instances as the research projects proceeded.[3] In one project in particular, the National Population Study on Pornography and Prostitution,[4] the public's views were sought on what sort of material would be acceptable or unacceptable for the different media and different audiences. Here specific reference was made to material using child models and the availability or access of young people to sexually explicit depictions.

2.1 Pornography

The issue of children or young people and pornography in Canada really involves a question of their access to pornography rather than their involvement in its commercial production. All the evidence available to the Committee indicates that the commercial production of pornography using children as models does not occur in Canada. None of the briefs presented to the Committee, for instance, indicated that child pornography is being produced commercially in Canada. We are confident, therefore, that when we address the question of child pornography, we are dealing with questions of very small-scale, non-commercial production and accessibility to materials. Indeed, it is doubtful that any country which produces pornography condones the open and commercial use of children in its production.

The child pornography which is produced seems to be the work of amateurs. Men, and occasionally women, are involved in the photographing of children whom they know and in the exchange of photographs among people with the same sexual interests. It appears that after the material leaves the original photographer, sometimes after it has circulated for some time, the photographs may be used in a picture magazine produced by fly-by-night operators who again circulate the material, usually through the mails. Production of these magazines seems to take place in the United States, but the authorities have little success in tracking down the producers as the place, addresses and names of the magazines change frequently and continually. Indeed, many of these magazines contain no information as to where and by whom they are produced. As with virtually all the pornographic material available in Canada, it enters the country through direct mailing or the regular importation channels.

While we may feel somewhat reassured that the use of children in the production of pornography is not condoned and is infrequent, this aspect is, in fact, only one part of the issue. What is termed child pornography may take into account material other than that which depicts those under 18 in sexually explicit poses.

Child pornography epitomizes the difficulty we face in defining pornography and in deciding what action, if any, is appropriate. Whether or not someone considers a work pornographic depends on the subjective assessment of the viewer and is often a question of the intent of the user. What is labelled child pornography, therefore, is sometimes pictures of children in the nude or pictures of clothed children with their clothing slightly (and some would say provocatively) disarranged. Often there is nothing overtly sexual about the actual photograph and what people see as problematic is the assumed use to which the photograph will be put.

Equally difficult is the fact that although some photographs are obviously of young children, the age of other models is much more debatable. Indeed, in some instances it is explicity stated that they are over 18. The issue then arises whether the concern is the potential harm to young people who are actually participating in the production, or whether it is the condoning of the message that sexual relations with children are acceptable, normal and perhaps even to be encouraged. Using models who look to be under 18 inculcates these ideas just as much as the use of those who are actually under 18.

If one extends the argument in this way, then written matter would be brought within the category of questionable material, even though this does not involve harm to participants. Thus, books and articles which condone or advocate sexual relations with children are arguably just as problematic as material which pictures such activities, since the message itself is being questioned and not just the way in which the message is delivered. These concerns consequently take the issue of child pornography in a different direction, to focus on the impact of the message on adults and children who have access to and use the material. It was this latter issue over which so many groups expressed concern at the public hearings.

As we have discussed in Part II, Section I, Chapter 6, pornography is more available in Canada today than it was five or ten years ago. This availability is related to the use of all forms of media, rather than just print or films, and to the selling or renting of pornography in a much wider variety of outlets than previously. There does not seem any doubt that pornography is widely available in all parts of the country, although there are regional differences, and that adult magazines in particular are available to children throughout the country. From the information presented to the Committee, it also seems highly probable that many young people have relatively easy access to pornographic videos, television shows and films. A major question, therefore, is whether we think it appropriate for children and young people to have easy access to such materials.

The research literature on the harms to individuals which can be associated with the use of pornography, deals exclusively with adults. As we have suggested elsewhere in the Report, there are insuperable ethical problems with exposing children to materials which might harm them. Based on the empirical research, therefore, it is impossible to demonstrate that exposure to pornography does have harmful consequences for children and young people. It should be clearly understood, however, that this lack of evidence does not mean that the contrary is true: that is, that pornography has no harmful effects on those exposed to it. The whole question is unresolved. People have suggested to the Committee, however, that even though the issue is unresolved, we should be very careful about the welfare of children, since they are seen as the most vulnerable group in society. Thus, while there may be no systematic evidence that pornography causes or does not cause changes in children's attitudes and behaviour, for the better or the worse, there are sufficient questions about the influence of the mass media in general, and about sexually explicit materials in particular, to suggest caution in making them easily and widely available to young people.

Furthermore, as we have argued elsewhere in the Report, we are concerned with depictions that can be seen to undermine the values which we believe are fundamental to our society. It is our view that material which uses and depicts children in a sexual way for the entertainment of adults, undermines the rights of children by diminishing the respect to which they are entitled. In particular, it interferes with their developing sexuality so as to distort it and to encourage the children so used to have aberrant views about human sexual relations.

We have already argued that some adult pornography is also unacceptable because of its distorted message and the resulting harm this causes to our values. It will be evident, given this view of some pornographic material, that we consider it essential to protect children from being exposed to it.

Given the mindless, degrading and sometimes violent depictions of human sexual relations common to some pornographic material, the argument that children should be protected from such distorting images is very powerful. We simply should not run the risk of encouraging young people to believe that the behaviour depicted in pornography is to be accepted or encouraged.

Concern about the possible effect of pornography increases to the extent that there may be no sources of countervailing information available to children and young people. Family life and sex education courses are not universally available in schools and it is not always apparent that parents deal effectively with these topics with their own children. Given these circumstances, we are particularly concerned that children may accept pornography because they do not have access to more accurate information.

It will be apparent that our argument rests on a belief that the harms which have to be demonstrated in order to justify intervention by the state are different for children in comparison with adults. Precisely because of their status as children, they are entitled to protection over a wider range of activities than are adults. That is, intervention by responsible people and authorities is justified before demonstrable physical or psychological harm occurs.

Confirmation of the concerns we heard at the public hearings to protect children from seeing sexually explicit material which is inappropriate for their age or under inappropriate circumstances, comes from the National Population Survey conducted for the Department of Justice in June and July, 1984. This survey involved a sample of 2,018 Canadians chosen so that they were representative of the over 18 year old population across the country, with the exception of the Yukon and Northwest Territories. The survey had several purposes, two of which were to determine:

> what the public considers to be offensive about prostitution and pornography, and perceptions about the harms (or benefits) of prostitution and pornography to themselves, their children and society in general

and

> the extent of public satisfaction with existing controls covering pornography and prostitution and preferences for various policy options.[5]

Out of all the issues investigated through the survey, the one on which there was overwhelming consensus was the use of children in sexually explicit material. Of the respondents, 94% agreed that sexually explicit material showing children is unacceptable in our society.

Canadians also believe that the harms associated with pornography are particularly evident in relation to children. Three-quarters of the respondents indicated that they thought that "exposure to pornography cannot help children develop healthy sexual attitudes" (76%) and that "availability of sex magazines in areas frequented by children is bad for them [children]" (78%).[6]

There are obviously very strong sentiments within Canada for ensuring that children are not used in the making of pornography, and that their access to such materials is more restricted than is currently the case.

As we have discussed in detail in the section on adults and pornography, there is no consensus among Canadians on how or if the material should be controlled when one is considering adults. Such a lack of consensus does not, however, carry over into the area of children.

For some people the issue of children's access to unacceptable material would be solved by the banning or censoring of all or much of the sexually explicit material now available through the entertainment media. If one takes those who expressed these views, together with those who would prefer to control children's access to the material rather than the material itself, it is evident that there is strong support for ensuring that children do not have access to pornographic material (See Table 4, Part II, Section I, Chapter 6).

2.2 Prostitution

Information from the research program undertaken by the Department of Justice, and from the Badgley Committee, confirms the information given at the public hearings that juvenile prostitution occurs across the country, in many mid-sized and all large cities.[7] Although the great majority of juvenile prostitutes work the streets, it is impossible to determine the size of the juvenile contingent. The problems of assessing the number of adults engaged in prostitution were discussed in Part III, Section I, Chapter 28, and these problems are compounded with respect to juveniles who do not want their age to be known by the various authorities. It also appears that more juvenile prostitutes work on an occasional or part-time basis, for example, just on weekends, so that the number of juvenile prostitutes fluctuates considerably during the week, as well as between seasons. As with adults, most of the prostitutes are female, although male juvenile prostitutes are more in evidence now than a few years ago. The ratio of female to male juvenile prostitutes, however, is unknown. With respect to male juvenile prostitutes, it is noteworthy that the majority, 75% according to the Badgley Committee's research, consider themselves to be homosexual.

Although very young people, for example, those 14 years or younger, are known to work the streets, most juvenile prostitutes appear to be 16 or older. This coincides with the age range at which some of the adult prostitutes said they began to work. Indeed, most adult prostitutes report starting in the business when they were juveniles although, clearly, this does not characterize all of them.

Just as the career of the adult prostitute is difficult to determine, so is the career of the juvenile. Juvenile prostitutes come from families at all economic levels and from families with a wide variety of social characteristics. Thus, it is difficult to find characteristics in the social backgrounds of these young people which one might argue would predispose them to choosing prostitution as a way to earn a living. Although it is by no means common to all the families of juvenile prostitutes, there is some indication that their families do experience difficulties and tensions in various ways. Divorce, or the absence of one parent, often the father, because of a family break-up or employment away from home, and the dependency on government financial programs appear to be characteristic of the families of many juvenile prostitutes. The majority of prostitutes interviewed by the Badgley Committee's researchers indicated that their home life was not a happy one and this was an important factor in their move to the streets.

The issue which currently receives considerable attention is that of the sexual abuse of children. It is thought that children whose normal sexual development is disturbed by incestuous or other abnormal sexual activities with adults, are likely to go into jobs where sexual precociousness is a prerequisite. Canadian research to date does not support this view.[8] Juvenile prostitutes are the victims of sexual abuse, but not to any significantly greater degree than other groups in society.

As was discussed in Part III, Section I, Chapter 28, however, our understanding of sexual abuse is at a very preliminary stage, and our conclusions about the level and severity of sexual abuse in the population as a whole, and among juvenile prostitutes in particular, are necessarily tentative. What can be stated at this time is that we do not know why some children who are sexually abused eventually turn to prostitution and others do not. Whether it is related to the severity of the abuse, or to the type and quality of the intervention following the incident, are questions to which we have no answers.

According to the Badgley Committee's data, however, the majority of juvenile prostitutes had had sexual experiences of one type or another by the time they were 13.

It also appears to be very characteristic of juvenile prostitutes that they dropped out of school before completing high school, most usually after grade 10. In addition, most of them have run away from home at least once and often several times, as a means of coping with problems with their families, but also as a way of dealing with school problems or of seeking adventure and new experiences. Typically the young people do not run away to become prostitutes, but their low levels of education and the need to support themselves make them particularly vulnerable to the lure of the streets. Economic reasons are indeed cited as the most common reasons for working as a prostitute. Knowledge about the profession typically comes from the media or from knowing someone who is already in the business, but there is little evidence to suggest that young people are actively coerced into prostitution. As the Badgley Report points out, however, there are all sorts of subtle inducements and pressures that may be exerted to encourage them to become part of the business.

One of the areas about which we have the least satisfactory information is in relation to the organization and control of juvenile prostitutes. Given the illegality of pimping, and moral disapproval of the pimping of juveniles, everyone engaged in the prostitution business is extremely reluctant to talk about the issue. Juvenile prostitutes run the risk of violence and physical abuse from their pimps if they talk about the relationship, because intimidation is a means of keeping the whole issue as quiet as possible. It appears that pimping is carried on only in relation to female prostitutes and only in a minority of cases. While 40% of the female juvenile prostitutes in the Badgley Committee's study indicated that they had been pimped at one time, only 10% indicated that they had a pimp at the time of the interview. In addition, adult prostitutes maintain that pimps avoid juveniles, if at all possible, because they are likely to bring them into increased conflict with the police. On this basis, the 10% figure might seem reasonable, but does not explain how such a high percentage of juvenile prostitutes come to have been pimped at some time, or how they now come to be independent operators. Just as the extent to which pimps are involved in the business remains a very debatable issue, so does the question of the prostitute's relationship to the pimp. Perhaps all that can be concluded at this time is that the relationships run from the totally exploitative and abusive to those which are freely chosen and mutually supportive. Which end of the continuum is most characteristic remains to be determined.

The services of juvenile prostitutes are usually bought by men aged between 30 and 50, who are married. Since customers are a very difficult group on which to collect information, researchers typically have to rely on the prostitutes' own assessments of their clients. There is, however, a remarkable degree of consistency in the descriptions of customers from one end of the country to another. The motivations of customers, and especially the motivations to seek out young prostitutes, are issues about which we can only speculate. We simply do not have any information which would lead to firm conclusions about this aspect of the business.

Juvenile prostitutes are most frequently requested to give oral sex or vaginal intercourse. Customers are likely to initiate contact with the prostitute and to indicate the services they are seeking. The sexual acts are usually performed in the customer's car, a hotel or motel room or an apartment belonging to the prostitute or someone else. The whole transaction is accomplished within half an hour.

Although some juvenile prostitutes indicate that they have regular customers, the sexual transaction is usually characterized by its anonymity and its speed. The prostitutes deliberately attempt to distance themselves emotionally from their customers and to provide the services for which they are paid as quickly as possible. This allows them to be back on the streets and be available to other customers and avoids any involvement with customers beyond the commercial transaction. While some of the juvenile prostitutes indicate that they enjoy their work, it appears that the majority of them find their situation to be anything but satisfactory.

The belief that the streets are a source of easy money continues to make the business attractive to young people. Estimates of income are difficult to obtain and even more difficult to substantiate. Juvenile prostitutes, like their adult counterparts, do not keep records of their transactions. Instead the level of earnings has to be reconstructed by calculating how many days a week and weeks a year a prostitute works, the average number of customers a week and typical prices for services. Much of this information depends on how accurately the juvenile prostitutes can remember their activities and the extent to which they wish to make known the full scope of their activities to people outside the business. The Badgley Committee reports that daily earnings average around $190 for the juvenile prostitutes in the national survey. This figure may be reflective of business on a good day in summer, and not be a very good indication of earnings throughout the year. Nevertheless, it is apparent that while some juvenile prostitutes earn very little, for example, under $50 a day, others are very much more successful in terms of their income. Female prostitutes tend to have higher earnings than males because they are not limited physiologically in the number of customers they can service in a day.

Despite the high level of earnings that at least some of the juvenile prostitutes attain, the young people typically have lifestyles that do not encourage planning or saving money. The money is earned and quickly spent, and any tentative plans the prostitutes may have to move out of the business are very difficult to attain. No money is accumulated to carry them out of prostitution and, indeed, the chances of them moving out would appear to rest on the consequences of intervention by various agencies and organizations, ranging from the family to the police.

It appears that most juvenile prostitutes have a criminal record. While the activities with which they are charged are not necessarily prostitution-related offences, it is apparent that the criminal activities are highly related to being a prostitute. Charges for soliciting are not very common because prostitutes are relatively circumspect in their behaviour, and rarely act in such a manner as to contravene the current interpretation of section 195.1 of the *Criminal Code*. Juvenile prostitutes are picked up for property offences such as shoplifting or theft, sexual offences, drug and alcohol offences, and assault. It would appear that most of the juvenile prostitutes acquire a criminal record after going on the streets and as a consequence of attempting to survive under very harsh conditions.

Drug and alcohol use may be one reaction to these conditions and one way of coping with the business. While some juvenile prostitutes indicated that they were heavy users of alcohol and drugs (about a third of the respondents in the Badgley Committee's research), it is apparent that most of them use such substances infrequently or not at all. Certainly, being on the streets appears to increase the opportunities for access to drugs, but this does not mean that juvenile prostitutes automatically become users. A further note of caution is also necessary on this issue, since we do not know whether the patterns of drug and alcohol use by juvenile prostitutes differ significantly from those of other young people. Thus, while it may seem reasonable to suppose that some of the young prostitutes seek to escape the worst aspects of the business through drugs and alcohol, we do not know whether this is a common response to life on the streets.

A further question related to health is the issue of sexually transmitted diseases (STD's). While adult prostitutes seem to be very aware of these problems, juveniles appear to be less well informed and to take fewer precautions. In some instances, the rates of infection are considerably higher than would be expected in the juvenile population, whereas in other cases, the rates are close to the normal level. Nevertheless, any rate of sexually transmitted diseases is a cause for concern and the fact that most juvenile prostitutes contract such a disease at some time is very serious. Many of the young people do seek routine medical check-ups, but some do not, and generally, juvenile prostitutes appear unconcerned about the possible long-term consequences for their health. STDs are just one more problem which is accepted as part of the life of being a prostitute.

The contacts of juvenile prostitutes with organizations attempting to dissuade them from working on the streets appear haphazard and frequently ineffectual. The police will pick up juvenile prostitutes on the streets and take them to child welfare agencies. Police officers typically see this action as being in the young person's own best interests, or as a way of lessening the number of prostitutes on the street and the associated disruptions. Social agencies are frequently not able to meet the needs of the juvenile prostitute. They lack the authority to hold juveniles for various assessments, they are under-funded and short of staff, and special programs to address the needs of this particular clientele are usually not in place. As the Committee heard time and time again, juvenile prostitutes can be back on the streets within a few hours of being picked up by the police.

On their own initiative, juvenile prostitutes use few social services. The ones they do use are usually those which assist with some immediate problem, for example, the need for medical attention, a room for the night or a meal. On the whole, juvenile prostitutes do not use social services designed to address issues with long-term consequences, such as training programs. Indeed, they appear to have a general contempt for social services and agencies and see themselves as being able to manage their own lives. Social services which have been most successful in assisting juvenile prostitutes are those which have been specially designed to meet their needs such as street worker programs or special hostels.

What happens to most juvenile prostitutes is unknown. Certainly some of them continue in the business as adults, but it is not clear that most of them simply graduate from being juvenile prostitutes to being adult prostitutes. Whether or not juvenile prostitutes move out of the business, and with what short and long term consequences for their lives, are issues which must be addressed in subsequent research.

Given the description of the concerns of those who appeared before the Committee, and the Committee's findings about the involvement in pornography and the nature of juvenile prostitution, let us now examine the present law, and how well it addresses those concerns.

Footnotes

[1] Badgley Report.

[2] *Ibid*, at 3.

[3] N. Boyd, *Sexuality and Violence, Imagery and Reality: Censorship and the Criminal Control of Obscenity*, Working Papers on Pornography and Prostitution (W.P.P.P.)#16; N. Crook, *A Report on Prostitution in the Atlantic Provinces* W.P.P.P.#12; M. El Komos, *Canadian Newspapers Coverage of Pornography and Prostitution, 1978-83* W.P.P.P. #5; J. Fleischman, *A Report on Prostitution in Ontario* W.P.P.P.#10; R. Gemme, A. Murphy, M. Bourque, M. A. Nemeh, and N. Payment, *A Report on Prostitution in Québec*, W.P.P.P.#11; M. Haug and M. Cini, *The Ladies (and Gentlemen) of the Night and the Spread of Sexually Transmitted Diseases* W.P.P.P.#7; C.H.S. Jayewardene, T.J. Juliani and C.K. Talbot, *Prostitution and Pornography in Selected Countries* W.P.P.P.#4; B. Kaite, *A Survey of Canadian Distributors of Pornographic Material* W.P.P.P.#17; John S. Kiedrowski, Jan, J.M. van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden* W.P.P.P.#1; M. Lautt, *A Report on Prostitution in the Prairies* W.P.P.P.#9; J. Lowman, *Vancouver Field Study of Prostitution, Research Notes* 2 vs., W.P.P.P.#8; H.B. McKay and D.J. Dolff, *The Impact of Pornography: an Analysis of Research and Summary of Findings* W.P.P.P.#13; T.S. Palys, *A Content Analysis of Sexually Explicit Videos in British Columbia* W.P.P.P.#15; Peat Marwick & Partners, *A National Population Study of Pornography and Prostitution* W.P.P.P.#6; D. Sansfaçon, *Agreements and Conventions of the United Nations with Respect to Pornography and Prostitution* W.P.P.P.#3; D. Sansfaçon, *Pornography and Prostitution in the United States* W.P.P.P.#2; Ian Taylor, *The Development of Law and Public Debate in the United Kingdom in Respect of Pornography and Obscenity* W.P.P.P.#14 Department of Justice, Ottawa, 1984.

[4] Peat Marwick & Partners, *A National Population Study of Pornography and Prostitution*, W.P.P.P.#6.

[5] *Ibid*., at 1.

[6] *Ibid*., at III-28 - III-39.

[7] Badgley Report.

[8] *Ibid*, Vol. I, Chap. 6.

Chapter 43

The Present Law

1. Pornography

There is no provision in the *Criminal Code* which addresses specifically the production, dissemination or use of child pornography.

There are, however, a number of substantive provisions in the *Code* which deal with obscenity or indecent materials generally. As these provisions have been analysed in detail in Part II, Section II, Chapter 7, only their main aspects and applicability to child pornography will be considered here. We shall also examine here the provisions of federal legislation other than the *Criminal Code*, which may affect child pornography.

1.1 Making, Possessing and Disseminating

Examining first the applicable provisions of the *Criminal Code*, we note that section 159 is the main section relating to obscenity. It prohibits, inter alia, the making, printing, publishing, distribution, circulating, selling, exposing to public view, or possession for any one of these purposes, of any obscene written matter, picture, model, phonograph record or other thing whatsoever. It also prohibits the public exhibition of a disgusting object or an indecent show.

Additional offences with respect to live shows are found in section 163. Subsection 163(1) makes it an offence for the lessee, manager, agent or person in charge of a theatre to present, give or allow to be presented or given an immoral, indecent or obscene performance, entertainment or representation. Subsection 163(2) makes it an offence to take part or appear as an actor, performer, or assistant in any capacity in an immoral, indecent or obscene performance, entertainment or representation in a theatre.

Section 164 of the *Code* creates the offence of making use of the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral, or scurrilous. To reinforce this provision, prohibitory orders may be made under the ***Canada Post Corporation Act***.[1] Subsection 41(1) of this *Act* allows the Minister to make an order prohibiting the delivery of mail addressed to or posted by any person that the Minister believes on reasonable grounds is committing or attempting to commit by mail an offence, or who is aiding, abetting, counselling or procuring any other person to commit such an offence. A prohibitory order may also be made against a person who, by means other than mail, is aiding, abetting, counselling or procuring any other person to commit an offence by means of mail.

One of the first questions arising in connection with these *Criminal Code* sections is whether what is popularly regarded as "child pornography" is within the scope of the words "obscene", "indecent" or "immoral" as used in those sections. Not only the meaning of those terms themselves, but also the impact of the so-called "community standards" test must be looked at to determine this question.

Section 159 contains a definition of obscene, but this statutory definition does not apply to the terms indecent and immoral used in sections 163 and 164. However, the common law definition of the terms, which does apply in connection with sections 163 and 164, also relies on the application of the community standards test which figures in the interpretation of section 158.[2]

Subsection 159(8) defines as obscene, "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence...". How this definition would apply to child pornography is a difficult question. The courts have convicted in cases where the material portrays incest[3] or juveniles engaged in sex.[4] Clearly, the more explicit the sexual conduct or the display of the child's sexual organs, the more likely the definition is to apply. However, nude still shots which show only the external sexual organs, particularly if the poses are not suggestive, may not be within the definition.

The application of the community standards test to determine whether something is obscene has important implications for juvenile pornography. In *Re Hawkshaw v. The Queen*[5] the Ontario Court of Appeal considered a charge under subsection 159(1) of the *Code*, arising from the making of an "obscene" picture. It held that the fact that the picture was intended solely for private viewing, and did not come into any hands other than those of the person who took the picture, are relevant in a consideration of what the Canadian community would tolerate. The implication, of course, is that there would be greater community tolerance if the material were designed only for private use, and a correspondingly greater difficulty in convicting under subsection 159(8).

Section 159 does not prohibit the possession of obscene material for private use. Private use has been generously defined by the courts. It may include showing obscene pictures to a friend or projecting an obscene film in one's own home.[6] It has also been held that showing obscene films in a community hall exclusively to invited friends and relatives is tantamount to a showing in a private gathering, and not prohibited by section 159.[7]

It may, however, be illegal under section 159 to make obscene material even for exclusively private use. Unfortunately, the law is not entirely clear on this point. In *Re Hawkshaw v. The Queen* the accused submitted to a developing laboratory a roll of film containing a picture of four persons, one of whom was performing fellatio on a seventeen year old boy. Although the Court accepted that the accused intended to use the photo only for private viewing, it nonetheless upheld his committal to stand trial for the offence of making or printing an obscene picture under section 159. Because the accused has appealed this decision to the Supreme Court of Canada, however, the issue raised by the case cannot be said to have been conclusively determined.

In addition to the *Criminal Code* provisions described above, section 14 and Schedule "C" of the *Customs Tariff* prohibit the importation into Canada of "books, printed paper, drawings, paintings, prints, photographs, or representations of any kind of an immoral or indecent character."[8] The contemporary Canadian community standard of tolerance has emerged as the decisive test in the Customs area as well as in connection with sections 159, 163 and 164 of the *Criminal Code* discussed above.[9]

Subsection 40(1) of the *Canada Post Corporation Act* requires that all mail from a country other than Canada containing or suspected to contain anything the importation of which is prohibited, shall be submitted to a Customs officer for examination. Customs officers are, in turn, required by subsection 40(3) of the *Act* to deal with all mail submitted to them under this section in accordance with the laws relating to the importation of goods. By means of the interrelationship between these subsections and the *Customs Tariff*, mail from outside Canada suspected of containing immoral or indecent material can be inspected.

These provisions with respect to mail and Customs regulations are significant to the issue of child pornography because the mails seem to be one of the frequently used ways of distributing and exchanging such material.

1.2 Involving Children in Pornography

There are a number of *Criminal Code* provisions which might apply in the case of someone securing the participation of a child or young person in the production of pornography. Subsection 168(1) of the *Code* penalizes anyone who, in the home of a child, participates in sexual immorality or indulges in any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in. In *R. v. E. and F.*,[10] the mother of a child and the mother's common law husband were convicted where they had photographed the eleven year old child in sexually suggestive poses. One of the obvious difficulties in looking for widespread use of this section is the requirement that the acts take place in the home of the child. There is no other section which has a direct application to the activities of adults in procuring youngsters for pornography.

Where the child is photographed while engaging in sexual relations with other people, then a number of sections of the *Code* may be applicable to the conduct of the child's partner. These include the offences of a male having sexual intercourse with a female under 14 years of age, or between 14 and 16,[11] having illicit sexual intercourse with a step-daughter, foster daughter or female ward,[12] and committing buggery or bestiality[13] or an act of gross indecency.[14] The parent or guardian of a female person who procures her to have illicit sexual intercourse with a person other than the procurer, or orders, is party to, permits, or knowingly receives the avails of the defilement, seduction or prostitution of the female person, is guilty of an indictable offence.[15] There are comparable provisions relating to the owner, occupier, or manager of premises who permits a female under 18 to resort thereto for purposes of having sexual intercourse with a particular male person or persons.[16]

Persons involved in the preparation of child pornography might also be charged with counselling or procuring a person to be party to an offence,[17] with aiding or abetting a person to commit an offence,[18] with conspiracy to commit an indictable offence[19] or with conspiracy "to effect an unlawful purpose".[20]

With the repeal of the *Juvenile Delinquents Act*,[21] the general offence of contributing to the delinquency of a minor is no longer available to charge persons using young persons in pornography.[22] However, there may be recourse against child exploiters through provincial child welfare laws. For example, section 38 of the *Alberta Child Welfare Act* provides that a person who has the care, custody, control or charge of a child and who ill-treats, neglects, abandons or harmfully exposes a child or causes or procures such ill-treatment, is guilty of an offence.[23] The child welfare statutes of Prince Edward Island, Québec, Manitoba, Saskatchewan, the Yukon Territory and the Northwest Territories create similar offences.[24] Such provisions address the conduct of a parent or guardian who procures or participates in the exploitation of a child by involving him or her in the production of pornography. Because of the stipulation that the accused person have the "care, custody, control or charge" of a child, however, it may be doubtful whether provisions like section 38 of the *Alberta Act* can reach the conduct of third parties not in the child's family or household circle.

The *Alberta Child Welfare Act* also purports to regulate the employment of children over 12 years of age in entertainments; the structure of the *Act* indicates that children under 12 may not in any event be so employed. Before granting a licence for the employment of a child over 12, the Child Welfare Commission must be satisfied of the fitness of the child to take part in the proposed entertainment or series of entertainments without injury to his or her life, limbs, health, education or morals. The Commission must also be satisfied that proper provision has been made to secure the health and kind treatment of the child. It is made an offence for anyone to employ a child under 16 without a licence "for the purpose of singing, playing or performing for profit or of offering anything for sale in a public place or a place to which the public is admitted on payment."[25]

Although provisions of this nature aimed at employment may be useful in addressing some types of child sexual exploitation through pornography, they do not of course address the situation where a child is photographed or filmed without being "employed" - i.e. paid. It is, in our view, likely that many, if not most, of the situations which concern us do involve unpaid use.

One further observation is appropriate concerning provincial child welfare provisions. Again we will use the Alberta statute as an example. The child welfare authorities may detain a child who is neglected as that term is defined in the legislation. There are many aspects of the definition of "neglected child" which would allow the authorities to remove a child from parents who were involving him or her in pornography; for example, paragraph 6(e)(xii) defines as neglected any child "whose life, health or morals may be endangered by the conduct of the person in whose charge he is." There is even the possibility that the child could be apprehended not because of parental defect, but because of third party actions involving the child in pornography; a "neglected child" is defined in paragraph 6(a)(v) as one found associating with an unfit or improper person.

We have not, however, found any provincial child welfare provision which describes a child as "neglected" because of the child's involvement in pornography, whether as an actor or as an unwilling consumer. We note that the Report of the Committee on Sexual Offences Against Children and Youths commented upon the absence from child welfare legislation of any specific provision characterizing a child as neglected because of sexual abuse. The Committee recommended that provincial authorities undertake a full review of local legislation, addressing this terminology issue and other issues relating to the clear specification of the types of investigative responsibility for suspected cases of the physical and sexual abuse of children.[26]

We agree that provincial child welfare authorities should be encouraged to review the question of their response to child sexual abuse, and consider that the more limited issue of children's involvement in the production of pornography should be on the agenda of any such review. However, we caution that not every child who is involved in the production of pornography may necessarily be a "neglected child" within the philosophy of child welfare legislation. In our view, it is useful to bear in mind that a determination that a child is neglected can result in removal of the child from his or her home, either temporarily or, after a court hearing, for a longer period. It may involve intervention by state agencies in the family's life for periods of time and orders that a third party is not to associate with a child, like those discussed elsewhere in this chapter.

In some cases, it may well be desirable to involve youth authorities and precipitate outcomes like these. In other cases, it clearly would not. Very often, the family itself will be quite able to deal with the child's involvement in the production of pornography, once made aware that it is going on. It would be unfortunate if too focused a definition of neglected child were to precipitate state intervention in the family, as described above, each and every time a situation of exploitation, even by third parties, were discovered. This is not to say that the state should forbear from intervening in a proper case. The problem is to achieve a balance between respect for the autonomy and capacity of the family to deal with exploitation of its own children (especially but not always where such exploitation is by persons outside the family), and the provision of state assistance where that is needed.

Recommendation 66

> **Provincial child welfare authorities are encouraged to review their response to child sexual abuse, as recommended by the Committee on Sexual Offences on Children and Youths (at pp. 548-549). We recommend that the issue of children's involvement in the production of pornography should be on the agenda of any such review. However, we caution that not every child involved in the production of pornography may be a neglected child within the philosophy of child welfare legislation. Accordingly, we recommend that a balance be struck between recognizing the autonomy and capacity of the family to deal with exploitation of its own children and the provision of state assistance where that is needed.**

1.3 Overview

In our view, a number of serious deficiences exist in the present law relating to child pornography. Firstly, there is doubt as to whether the definition of obscene, or immoral, or indecent, would reach some types of material which arguably should be caught by the criminal sanction. Similarly, material prepared for only private use should not, in our view, escape criminalization. At present, it may do so, because of the application of what is, in effect, a more forgiving community standard for materials used privately. Our hearings and research have disclosed that private preparation and use of child pornography is a major mode of resorting to this material. We have also learned that contemporary Canadian community standards are running strongly against such private use.

We also note the absence of a really effective and direct sanction against persons who involve children in pornography. The sanctions against theatrical performances found in subsection 159(2)(b) ("indecent show") and section 163, do not really reach those whose use of children is private. Nor do the child welfare provisions aimed at regulating the use of children in "entertainments".

It must be recognized that much, if not most, exploitation of children occurs in situations which would be defined as private in our law. Existing criminal sanctions are not likely to reach much of the private exploitation of children. Even section 168 of the *Code* has application only where the offence takes place in the child's home, so that exploitation in someone else's home, or a hotel or studio, would not be reached. Section 166 criminalizes only the defilement of female children, and is addressed only to the parents or guardians of the child. Nor is it made clear in the section that securing the child's participation in the preparation of pornography would be criminal conduct.

The provisions of the *Code* criminalizing certain aspects of the production of child pornography have, in our view, obvious limitations and do not represent any serious alternative to a section dealing directly with the use of children in pornography. One of these limitations is that most of the sections listed apply only where the behaviour represented involves two or more persons; in some cases, one of the persons must be an adult for the section to apply. Thus, photographs of a child alone or of two children would not attract to the participants the sanctions described. Most particularly, the sections do not reach the conduct of the person who produces the pornography and benefits from it.

Although child welfare laws may be useful in many situations involving the use of children in pornography, they have several limitations. Not all the provinces have provisions which make it an offence to ill-treat or procure the ill-treatment of a child, and the sanctions attached to this offence in the jurisdictions where it does exist are, in any event, not large. Intervening in the family by way of the neglected child provisions of child welfare legislation is not always a good solution, particularly where the threat to the child has come from outside the family.

In our view, it is necessary to provide direct criminal sanctions which would deter the use of children in the production of pornography. Sanctions against possession of pornography involving children are also, in our opinion, important because they attack the market for such materials and arguably will thereby reduce the incentive to produce it.

Recommendation 67

We recommend the enactment of criminal sanctions for the production, dissemination, and possession of "child pornography".

In chapter 46 of this Part, we propose amendments to the *Criminal Code* to introduce criminal penalties for the production, dissemination and possession of child pornography. Before proceeding to describe those measures, however, we shall examine some of the unsuccessful legislative initiatives in this area.

1.4 Previous Reform Attempts

Since 1959, the year of the last reform of the *Criminal Code* sections dealing with pornography, a number of efforts have been made to introduce bills dealing specifically with child pornography. The thrust of such efforts has been twofold. Proponents of the bills have sought to have included in the *Code* a definition of "obscenity" which specifically mentions portrayal of children, and they have also sought to penalize persons for using children in pornographic materials.

Considering firstly those bills dealing with the definition of pornography, it is noteworthy that nine bills receiving first reading in the House of Commons on October 31, 1977 all proposed to add to the *Criminal Code* a section creating an offence for everyone who photographs, produces, publishes, imports, exports, distributes, sells, advertises or displays in a public place, anything that depicts a child performing a sexual act or assuming a sexually suggestive pose while in a state of undress. The bills all defined "child" as a person who is or appears to be under the age of 16 years. The bills defined "sexual act" as masturbation, any act of sado-masochism, and any act of anal, oral, or vaginal intercourse, whether alone or with or upon another person, animal, dead body or inanimate object. An attempted or simulated sexual act was included.[27] A tenth bill, also receiving first reading in October 31, 1977,[28] made it an offence knowingly to produce, publish, transmit, distribute, sell or receive for resale, a film or publication of any kind that depicts a child engaged in a sexually explict act. The definitions of "child" and "sexually explicit act" were the same as in the other nine bills.

All of these bills were referred to the Standing Committee on Justice and Legal Affairs. The Committee concluded that "so-called "kiddie-porn" is reprehensible and clearly unacceptable in contemporary Canadian society."[29] It recommended that the definition of obscenity in the *Criminal Code* be amended to include sexually explicit material involving children. The definition proposed by the Committee was that a matter or thing should be deemed to be obscene where it depicts or describes a child engaged or participating in an act or simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or displaying any portion of its body in a sexually suggestive manner.[30] Child was defined as a person who is or appears to be under the age of 16 years.

Following the report of the Standing Committee, two attempts were made to have this definition or a similar one inserted into the *Code*. Bill C-434, a Private Member's bill introduced into the 1977-78 Session by Mr. Whiteway, sought to include the Standing Committee's definition in the *Criminal Code*. Bill C-21, proposed by the Minister of Justice, received first reading on November 21, 1978. This bill defined a matter or thing as obscene where it "unduly depicts a totally or partially nude child engaged or participating in an act or a simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or unduly displaying any part of his or her body in a sexually suggestive manner."[31] Whereas Mr. Whiteway's bill tried explicitly to forbid reliance on evidence of community standards where child pornography was concerned,[32] the government bill used the term "unduly", which presumably would have provided the basis for the introduction of community standards evidence.

Neither of these bills was proceeded with. In 1981, however, Bill C-53 was introduced by the Minister of Justice. The bill created a number of offences relating to visual representations of a person under 16 years of age participating in sexually explicit conduct: inducing, coercing or agreeing to use a person under 16 to participate in such conduct for the purpose of making a visual representation; participating in the production of a visual representation; and making, printing, reproducing, publishing, distributing, circulating, selling, offering to sell, receiving for sale, advertising, exposing to public view, or having such a representation in his or her possession for any such purpose. This bill was not proceeded with either.

A number of attempts have been made since 1959 to strengthen the prohibitions against involving young people in sexually explicit conduct, and these are discussed below in the portion of this chapter dealing with young persons and prostitution. Only two bills have aimed specifically at involvement of young people in sexually explicit behaviour for the purpose of producing pornographic material. Bill C-53, introduced by the Minister of Justice and given first reading on January 12, 1981, would have made it an offence knowingly to induce, coerce or agree to use a person under 16 years to participate in any sexually explicit conduct for the purpose of producing, by any means, a visual representation of such conduct. The bill further provided that a person who at any material time appeared to be under the age of 16 would, in the absence of evidence to the contrary, be presumed to be under 16.

On February 8, 1983, Mr. Kilgour's bill C-673 received first reading. The bill created an offence for everyone who employs, uses, persuades, induces, entices, or coerces a person who is under 18 years of age to engage in sexually explicit conduct with the intent to disseminate any audio, visual or printed medium depicting such conduct. The bill also created the offence of being a parent, legal guardian, or person having the custody or control of a person under 18 years of age, and assisting or permitting such a person to engage in sexually explicit conduct with the intent to disseminate any audio, visual or printed medium depicting such conduct.

The recommendations of this Committee dealing with child pornography and the procurement of children to be in pornography are set out and discussed below. Included in this discussion are observations about how our proposals differ from the numerous attempts over the years to legislate on child pornography. At this point, it is appropriate to consider the other aspect of the pornography problem involving children, that is, their exposure to pornography.

1.5 Exposure of Children to Pornography

The exposure of youngsters to offensive or pornographic material is addressed in a number of ways in federal and provincial legislation.

In the *Criminal Code*, we find, again, the basic prohibition in section 159 against the distribution, circulation, selling, exposure to public view or possession for any of these purposes, of any obscene written matter, picture, model, phonograph record or other thing whatsoever. A merchant keeping obscene materials for sale would be caught by this provision; and accordingly, one of the side effects of the provisions may be to encourage some commercial enterprises to restrict the type of material they have available.

Submissions at the public hearings of this Committee did, however, focus on a number of shortcomings of this criminal prohibition as a means of controlling what youngsters have access to, willingly or unwillingly. One such shortcoming is that the section reaches only those found with material within the definition of obscene. That definition, in the view of many, is not broad enough to include the sorts of material they would keep from young people, whatever may be the merits of the section where adults are concerned. Thus, many magazines, notices, posters or advertisements that would be considered inappropriate for young persons to see, are displayed with impunity.

Briefs at the public hearings also indentified enforcement of the *Criminal Code* provisions as a source of difficulty where material offensive to young people is on view. Community groups sometimes charged that material which they consider to be clearly within section 159 is left alone by local enforcement authorities. Many reasons are given, by community groups or police officials, for not responding to citizen complaints about this material. One, of course, is a difference of opinion between citizens and police about the applicability of section 159. The difficulties caused by the vague standards in subsection 159(8) have already been canvassed above. However, other reasons do not seem so reasonable. We have been told, for example, that some local authorities may believe that any publication which has entered Canada must have had clearance from Customs officials. Such clearance is not, however, a defence in law to a charge under section 159. We have also been told that unfortunately, some police authorities or Crown attorneys may not consider charges worth bringing, because of the high likelihood of acquittal. In some communities, too, citizens may be reluctant even to press for police action because of the size or closeness of the community and the prominence of the retailer whose conduct is offensive.

Because the criminal law sanctions against display of material are, for most purposes, of no practical use, more and more muncipalities have turned in recent years to the enactment of by-laws to control display of so-called adult materials. The central features of such by-laws will often be requirements that the merchant place "adult" material at a certain height from the floor, and ensure that it has an opaque cover or is displayed in such a way that only the title is visible.

This course of action was recommended by the Standing Committee on Justice and Legal Affairs in its 1978 Report. Its recommendation number 8 stipulated that:

> Provincial, regional, municipal and local authorities should adopt the necessary licensing, zoning, and child protection legislation, regulations, and by-laws to ensure that acceptable sexually explicit material is advertised, displayed, and sold discreetly to adults and under no circumstances to children or young people.[33]

The availability to young people of offensive records, audiotapes, record jackets, and videotapes was also cited in our hearings as the cause of difficulties. There are at present very few regulatory regimes which deal with any aspect of this problem. In fact, there are no controls, other than the criminal law, on audio recordings, and in only two jurisdictions, Nova Scotia and Ontario, have videotapes been brought under the aegis of a review board regime. These provinces require licensing of retail film exchanges which sell or lease material for private consumption. Details of the review scheme are outlined above.

We received many representations during the public hearings on the need for a good classification system for videotapes, so that parents wishing to do so could monitor their children's selections. In the absence of such a system, we were told, it is not always possible to determine from the title of a tape what its contents are likely to be, because titles of children's entertainments are sometimes also used for sexually explicit tapes. Similarly, we were told of young people unwittingly being subject to unpleasant material because of the difficulty of predicting from the title and cover what will be in the tape.

For the most part, parents who presented briefs at the public hearings did not expect the state to do the full job of protecting their youngsters from offensive or illegal material. These parents recognized willingly the role of the family in shaping the tastes and standards of young people, and in helping them to understand their developing sexuality. However, there was a distinct expectation on the part of parents that society should assist them in this endeavour. The film classification system now in operation in most jurisdictions was cited as a good example of how the state can provide information to parents. In some briefs, however, there were calls for greater particularity in descriptions of films, and for requirements that operators of movie establishments be more forthright about the classifications assigned by the authorities to movies they display.

Overall, however, the two methods of reviewing and classifying films and videotapes, and display restrictions for other adult material, received widespread and firm support as useful methods of helping parents monitor what young persons are to see. Interestingly, while there was some support at the hearings for the idea of segregating "adult only" movies and books to particular stores or enclaves in the city, such support was not uniformly strong. It appears that there is considerable confidence that properly administered systems of classification on the one hand, and display control on the other, can effectively handle the problems perceived by most.

Recommendation 68

Provincial and municipal authorities should continue their efforts to control the access of young people to offensive material by means of film and video classification systems and municipal by-laws regulating access to adult material.

Some presenters at the public hearings drew to our attention the problem of young people gaining access to offensive material through adults or older children, and asked for measures specifically to deal with this problem. Where the material is provided by the parent, guardian or other person in charge of a child, then section 168 of the *Criminal Code* or child welfare legislation, may provide some recourse. However, where it is an adult who is not a parent, or an older child, who makes available the material, then there is no readily apparent direct recourse.

The availability problem and other issues related to the display of offensive material to youngsters, have been addressed in a series of bills introduced into federal Parliament in recent years to deal with pornography.

Bill C-210, introduced by Mr. Whiteway and receiving first reading in October, 1976, would have created for the provinces, classification boards which had jurisdiction over "any written matter, picture, model, phonograph record or other thing whatsover." The bill created an offence of knowingly, without lawful justification or excuse, selling, exposing to public view or having in possession for these purposes, any matter classified by the board as "restricted", in any outlet frequented by persons who are or appear to be under 18 years of age.

Mr. Whiteway's Bill C-281, receiving first reading in October, 1977, would have created a new offence of exposing minors to offensive publications or shows. The proposed new subsection 159(2.1) created the offence of knowingly, without lawful justification or excuse, exposing in a public place or in a place where persons under the age of 18 years are admitted, any matter or thing or live show that depicts or presents a person, whether or not in a state of undress, unduly displaying his or her body in a sexually suggestive manner, or engaging or participating in an act or a simulated act of masturbation or sexual intercourse, gross indecency, buggery or bestiality.

In Bill C-325, sponsored by Mrs. Appolloni in 1977, a new subsection 166.1(2) would have made it an offence for the proprietor or manager of premises open to the public to display, exhibit or advertise any matter or thing of a lewd or sexually suggestive nature. The section stipulated that the defence to a charge involved proof that no child has access to the premises, and that no child is exposed to the matter or thing from outside the premises, or proof that the matter or thing cannot harm a child morally or psychologically.

Mr. Kaplan's Bill C-411, which received first reading in December, 1977, made it an offence for the proprietor or manager of an adult bookstore, an adult motion picture theatre, an adult coin-operated entertainment establishment, an adult topless entertainment establishment, or an adult physical culture establishment, to display or describe a specified sexual activity or specified sexual area, as defined, on a sign, in an advertisement, in the window of the premises or by any means that attracts public attention outside the premises.

The Bill included specific definitions for the various "adult" outlets against which the offence was directed. It defined "specified sexual activity" as an act of sexual intercourse, sodomy or masturbation by a person; or fondling or erotic touching of the genitals, pubic region, buttocks or female breasts of a person; and specified "sexual area" as the naked genitals, pubic region or buttocks of a person, or that portion of a naked female breast located immediately below a point at the top of the areola.

Mr. Kilgour's Bill C-673 received first reading in February, 1983. It would have made it an offence to disseminate pornographic material to a person who is under 18 years of age, or to any person in a manner affording no immediately effective opportunity to avoid exposure to such material, or to commercially disseminate pornographic material to any person.

The recommendations of this Committee concerning availability of pornographic or offensive material to youngsters are set out and discussed below. We have not followed any particular bill described above, although there is some similarity between what is proposed by this Committee and some of the approaches experimented with by the Private Member's bills.

Now let us turn to an examination of the present law relating to prostitution.

2. Prostitution

2.1 Activities of the Child Prostitute

Section 195.1 of the *Criminal Code* provides that:

> Every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction.

A young person may be charged under this section, and tried for the offence in a youth court pursuant to the *Young Offenders Act*.

The *Young Offenders Act* was proclaimed in force as of April 2, 1984. As mentioned above, a young person is defined in that *Act* as a person who is, or who, in the absence of evidence to the contrary, appears to be 12 years of age or more, but under 18 years of age. It is intended that by April 1, 1985, 18 will be the uniform upper age limit for this *Act* for all of Canada. In the transitional phase spanning the first year of operation of the *Act*, provinces are permitted to establish upper age limits lower than 18. In Newfoundland and British Columbia, the upper limit is now 17, and in Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Saskatchewan, Alberta, the Yukon Territory and Northwest Territories, it is 16.[34]

A significant feature of the *Act* is that it does not apply to anyone under 12 years of age, defined in the *Act* as a "child".[35] Moreover, section 72 of the *Act* enacts a new section 12 for the *Criminal Code*, specifying that no person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of 12 years. Formerly, sections 12 and 13 of the *Code* (repealed by the *Young Offenders Act*) had provided that no person while over the age of 7 and under the age of 14 years could be convicted of a criminal offence, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.[36]

Certain important consequences flow from the fact that section 195.1 of the *Criminal Code* creates a summary conviction offence. These consequences arise whether the accused is subject to the *Young Offenders Act* or the *Criminal Code* procedures. By reason of subsection 452(2) of the *Criminal Code*, the arresting officer shall release from custody a person charged with a summary conviction offence, with the intention of compelling his appearance by way of a summons, or shall issue an appearance notice to the person, as soon as is practicable after an arrest. The officer may refrain from following this procedure if he or she has reasonable and probable grounds to believe that it is necessary in the public interest that the person be detained in custody, or that the person will fail to attend in court if released from custody. In making his or her determination about the public interest, the officer is entitled to have regard for the need to establish the identity of the person, secure or preserve evidence of the offence, or prevent the continuation or repetition of the offence or the commission of another offence.

Where the arresting officer does not release the accused pursuant to subsection 452(2), the officer in charge at the police station may do so. The officer in charge may compel the person's appearance by way of a summons,[37] or release him or her on a promise to appear[38] or on a recognizance not exceeding $500.[39] The officer in charge has the same mandate to consider the public interest in favour of keeping the person in custody as does the arresting officer. All of these provisions concerning release by police officers of someone charged with a summary conviction offence are in addition to the judicial interim release provisions of the *Code*.

Significantly, these release procedures are available in the case of a young person charged with soliciting under section 195.1. Both under the former *Juvenile Delinquents Act* and under the *Young Offenders Act*, a police officer might release a young person upon issuing a summons or appearance notice or upon his or her promise to appear on recognizance. The availability of these release procedures is explicitly recognized by subsection 9(2) of the *Young Offenders Act*.

We received many submissions about the difficulty caused by the so-called "revolving door" whereby a young person arrested for soliciting could be out on the street after a few hours. The existence of the revolving door was attributed by some witnesses to defects in provincial child protection laws, or to the scarcity of adequate resources for the detention pending trial of young people charged with soliciting.

Where the young person is charged with an offence under section 195.1, however, it would appear as if the root of the revolving door syndrome is in the release procedure set out in the *Code* for summary conviction offences. This procedure makes possible release without a judicial hearing, and without conditions about activities and associates being laid down for the young person. It seems as if police officers may give insufficient attention to their discretion to retain someone in custody, if to do so is in the public interest, having regard to the need to prevent the continuation or repetition of the offence or the commission of another offence. It may well be, of course, that the absence of appropriate detention facilities for young persons charged with soliciting contributed to some of the decisions to release them summarily.

Under the *Young Offenders Act*, subsection 9(2), notice of the summary release of a young person must be given to his or her parent. If the whereabouts of the parents are not known or it appears that no parent is available, the notice may be served on an adult who is known to the young person and likely to assist him. A youth court judge may dispense with this requirement of notice.[40]

A similar notice to the parent, guardian or relatives was required under the former *Juvenile Delinquents Act*,[41] and it had been held that lack of notice is a jurisdictional defect which prevents the court from convicting or acquitting.[42] Dismissal of the charge was apparently available at the instigation of defence counsel where the notice was defective.[43] We learned, at the public hearings and in our other research, that young persons sometimes gave false names upon being arrested for soliciting. Such practices may, of course, have led to the inability to proceed on some charges, but we have no information on the number of such cases. The provision in the *Young Offenders Act* that the youth court judge may dispense with notice altogether, may relieve against difficulties caused by the improper identification of young people charged with street soliciting. However, even under the *Young Offenders Act*, failure to give notice will still invalidate any subsequent proceedings where the notice requirement is not dispensed with, or where a parent does not actually attend the hearing.[44]

In addition to the prohibition against street solicitation, the young prostitute could face a charge under subsection 193(1) of the *Code* for keeping a common bawdy house. Under this provision, premises used by only one person for the purpose of prostitution or the practice of acts of indecency, can constitute a common bawdy house. Accordingly, even discreet use by a person of his or her apartment could attract the charge.

Being a keeper of a common bawdy house is an indictable offence. By reason of subsections 483(c)(vi) and 452(1) and 453(1) of the *Criminal Code*, a person arrested on this charge can be released by the arresting officer, or officer in charge, in the same summary way as can someone charged with a summary conviction offence.

The *Criminal Code* is not the only recourse available to law enforcement agencies if young people are found engaging in soliciting or acts of prostitution. They can be taken into care under the child welfare legislation of a province, as a child in need of protection, or a neglected child. It would appear that most provincial statutes include definitions of neglected child which are broad enough to include a child involved in prostitution. The explanation for the so-called revolving door syndrome in child welfare proceedings may depend to some extent on the wording of the individual provincial legislation. We suggest, however, that one underlying cause for the phenomenon in these proceedings, as in ones based on the criminal law, may be absence of adequate resources for the detention of the young person pending a hearing.

2.2 Using the Services of a Child Prostitute

There is no provision in the *Criminal Code* which specifically addresses the purchase by adults of the sexual services of the young. There are some sections which may, however, apply to particular sorts of conduct.

A male person who has sexual intercourse with a female person, not his wife, who is under the age of 14 is guilty of an indictable offence and liable to imprisonment for life.[45] The provision applies whether or not the person believes that the girl is 14 years of age or more. There is no requirement that the girl be "of previously chaste character", and the fact that the person consented to the commission of the offence is not a defence.[46]

It is an offence for a male to have intercourse with a female person, not his wife, who is 14 years of age or more, and under 16 years. However, the youngster must be "of previously chaste character."[47] Clearly, this requirement means that the provision would be inapplicable in the case of a juvenile prostitute. Also inapplicable for the same reason is section 151 of the *Code*, making it an offence for a male 18 years of age or more to seduce a female of previously chaste character who is 16 years or more of age, but under 18.

The limitations of the foregoing provisions are serious. To be protected by the *Code*, juveniles over 14 must have a previously chaste character, and even then, the *Code* protects only against intercourse. For example, a person could not be charged with requiring a 12 year old girl to masturbate him or perform fellatio on him. None of these provisions applies, in any event, to acts performed on young males, whether by males or by females.

The *Code* provides that everyone who commits buggery or bestiality[48] or an act of gross indecency with another person[49] is guilty of an indictable offence. Acts performed in private between husband and wife or between two consenting persons, each of whom is 21 or over, are not illegal.[50] A person can be charged with an offence of buggery or gross indecency even if the person with whom it is committed is not "of previously chaste character."

Turning now to the *Code* provision about soliciting, it should be noted that because of conflicting decisions from the Courts of Appeal of British Columbia and Ontario, it is unsettled whether a customer or potential customer of a prostitute can be charged with an offence under section 195.1. The B.C. Court of Appeal has ruled that a prospective customer cannot be charged,[51] but, in another case, the Ontario Court of Appeal refused to follow this ruling, and upheld the charge against the prospective customer.[52] Accordingly, the section offers no reliable protection against the solicitation of young persons.

2.3 Provisions Aimed at those Involving Young Persons in Prostitution

Section 166 of the *Criminal Code* provides that a parent or guardian of a female person who procures her to have illicit sexual intercourse with a person other than the procurer, or orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of the female, is guilty of an indictable offence.

Section 167 provides that an owner, occupier or manager of premises, or person who has control of premises or assists in their management, who knowingly permits a female person under the age of 18 to resort to or be in or upon the premises for the purpose of having illicit sexual intercourse with a particular male person, or male persons generally, is guilty of an indictable offence.

Subsection 195(1) of the *Code* provides for an indictable offence for everyone who:

(a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,

(b) inveigles or entices a person who is not a prostitute or a person of known immoral character to a common bawdy house of assignation for the purpose of illicit sexual intercourse or prostitution,

(c) knowingly conceals a person in a common bawdy house or house of assignation,

(d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,

(e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy house, with intent that the person may become an inmate or frequenter of a common bawdy house, whether in or out of Canada,

(f) on the arrival of a person in Canada, directs or causes that person to be directed, or takes or causes that person to be taken, to a common bawdy house of assignation,

(g) procures a person to enter or leave Canada, for the purpose of prostitution,

(h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,

(i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or

(j) lives wholly or in part on the avails of the prostitution of another person.

Provincial child welfare legislation may also provide recourse against persons introducing children to prostitution or maintaining them in it, or using the services of child prostitutes. We have discussed above some of the shortcomings of provincial child welfare legislation, and here merely point out that those same shortcomings are evident in connection with use of the legislation to deal with child prostitution.

The principal advantage of such provincial legislation may be in enabling some severance of the connection between the child and the person creating the danger. The New Brunswick *Child and Family Services and Family Relations Act*, provides that the security or development of a child may be in danger when the child is physically or sexually abused, sexually exploited or in danger of such treatment.[53] The child may be taken into "protective care" in such a case. Within five days, unless the child is released, a court hearing ensues. At the hearing, one of the orders which may be made[54] is a "protective intervention order", directed to any person who, in the opinion of the court, is a source of danger to the child's security or development. Such an order may contain a direction to any person to refrain from any contact or association with the child. Violation of such an order is an offence.[55] Similarly, Québec's *Youth Protection Act* permits that parents and child may agree with youth protection authorities that certain persons refrain from coming into contact with a child; where there is no such voluntary agreement, a court application may produce an order to this effect.[56]

This Committee did not hear any evidence that would suggest that use of provisions like these is legally improper in the case of persons introducing juveniles to prostitution, keeping them in prostitution, or using their services. It would seem that the main determinants of whether the child welfare legislation will be used are the discretion of law enforcement officials, and availability of resources.

2.4 Previous Reform Attempts

A number of the bills introduced into the House of Commons in the last 10 years which have addressed the issue of involving young persons in sexual activities, have done so from the perspective of both pornography and prostitution. We have discussed above, Bills C-53 and C-673 which sought specifically to forbid the procurement of children to engage in the production of pornography. Other suggestions for reform have been much more broadly worded.

In 1977, Bill C-206, a Private Member's bill sponsored by Mr. Epp, proposed that it be an offence to procure a child to engage in or to assist any person to engage in a sexually explicit act, or to procure, to be party to, or knowingly receive the avails of the defilement, seduction or prostitution of a child. "Child" was defined as a person who is or appears to be under the age of 16 years. A "sexually explicit act" was defined as any act of masturbation, sado-masochism, or anal, oral, or vaginal intercourse, whether alone or with or upon another person, animal, dead body or inanimate object, and was said to include an attempted or simulated act.

This proposal to amend the present section 166 of the *Criminal Code* was aimed at every person, rather than just parents or guardians as the present section 166 is. It also would have protected young males as well as young females. These two features have characterized every attempt at legislative reform of this section since this bill.

The Standing Committee on Justice and Legal Affairs proposed in its 1978 report that section 166 of the *Code* be amended. The offence recommended by the Committee was identical to that in Mr. Epp's bill, with the exception of the Committee's definition of "sexually explicit act". The Committee proposed that the term encompass any act or simulated act of masturbation, sexual intercourse, gross indecency, buggery or bestiality, or the display of one's body in a sexually suggestive manner. The Committee proposed a slightly more restrictive definition of a "child", namely a person who is under the age of 16 years. Omitted from the definition was a person who appears to be under the age of 16.[57]

It is clear from the Committee's report that it considered that this reform of section 166 would reach the conduct of those who procure children to participate in the production of sexually explicit materials, as well as of those who procure children to engage in prostitution.[58] Mr. Whiteway introduced Private Member's Bill C-434 into the 1977-78 Session in order to implement this recommendation of the Standing Committee, but the bill was not passed.

Two government bills introduced after the Report of the Standing Committee also addressed the issue of procuring children.

Bill C-21, which received first reading on November 21, 1978, would have created two separate offences. The first involved the parent or guardian who procures a person to have illicit sexual intercourse with a person other than the procurer, or who orders, is a party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of that person. Where the young person is under the age of 16 years, the offence was subject to a higher penalty than was the case when the young person was 16 years, but not more than 21 years.

The second offence was with respect to a person, not a parent or guardian, who procures a person under the age of 16 years. That offence carried a penalty similar to that imposed on a parent procuring a child under 16. In respect of both these offences, the bill provided that it is not material that an accused believed that the person in relation to whom the offence was committed was 16 years of age or more.

Bill C-53, which received first reading on January 12, 1981, made it an offence for the parent or guardian or person having the lawful care or charge of a person, or exercising authority over a person under 16 years of age, to engage in sexual misconduct with that person, or procure or knowingly permit sexual misconduct by that person. Similarly, it was made an offence for the owner, occupier or manager of the premises, knowingly to permit the premises to be used for the purposes of sexual misconduct involving a person under the age of 16.

The bill created offences involving third parties who were neither parents nor the managers of premises. A person who engaged in sexual misconduct with a person under the age of 14, or procured sexual misconduct by such a person, was guilty of an offence. Defences to this charge included the fact that the accused was under 14, or less than 3 years older than the complainant, but did not include the alleged consent of the victim, or a mistaken belief about the age of the victim. A comparable offence was created in respect of a person 14 years of age or more but under 16. Defences included the fact that the accused was under 16, or less than 3 years older than the victim, a mistaken belief about the age of the complainant, and the fact that the accused was less responsible than the victim for the sexual misconduct which took place. The bill did not provide a definition of "sexual misconduct".

In addition to these attempts to deal with procuring of a child, there has been one effort to address the issue of solicitation of a child by an adult. Bill C-360, introduced by Mr. Kaplan in 1974, would have added to the *Code* a new offence of inviting a person 14 years of age or under to engage in a sexual act.

This Committee's recommendations with respect to procuring are discussed below. Before proceeding to elaborate upon them, we will examine the activity at the international level, and in certain other jurisdictions, with respect to pornography and prostitution involving children.

Footnotes

[1] *Canada Post Corporation Act*, S.C. 1980-81-82-83, c.54.

[2] *R. v. Popert* (1981), 58 C.C.C. (2d) 505 (Ont. C.A.).

[3] *R. v. McDougall's Drug Store* (1982), 109 A.P.R. 463 (N.S. Co. Ct.) and *R. v. Cinema International* (1981), 13 M.R. (2d) 337 (Man. C.A.)

[4] *R. v. Penthouse* (1979), 96 D.L.R. (3d) 735 (Ont. C.A.).

[5] (1982), 69 C.C.C. (2d) 503 (Ont. C.A.).

[6] *R. v. Rioux* [1970], 3 C.C.C. 149, at p.169 (S.C.C.).

[7] *R. v. Harrison* (1973), 12 C.C.C. 26 (Alta. Prov. Ct.).

[8] *Customs Tariff Act*, R.S.C. 1970, c. C-41, s.14 and Schedule C.

[9] *U. of Manitoba v. Deputy Minister of Revenue for Customs and Excise* (1983), 24 Man. R. (2d) 198 (Man. Co. Ct.).

[10] (1981), 61 C.C.C. (2d) 287 (Ont. Co. Ct.).

[11] *Criminal Code*, s.151.

[12] *Ibid.*, s.153.

[13] *Ibid.*, s.155.

[14] *Ibid.*, s.157.

[15] *Ibid.*, s.166.

[16] *Ibid.*, s.167.

[17] *Ibid.*, s.23.

[18] *Ibid.*, s.22.

[19] *Ibid.*, s.423(1).

[20] *Ibid.*, s.423(2).

[21] *Juvenile Delinquents Act*, R.S.C. 1970, c.J-3.

[22] Section 33 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 made it a summary conviction offence knowingly or wilfully to aid, cause, abet, or connive at the commission by a child of a delinquency, or to do any act producing, promoting or contributing to a child's being or becoming a juvenile delinquent or likely to make a child a juvenile delinquent. Subsection 2(1) defined juvenile delinquent as any child who violates any provision of the *Criminal Code* or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice.

[23] *Child Welfare Act*, R.S.A. 1980, c. C-8.

[24] Badgley Report, Vol.1 at 548.

[25] R.S.A. 1980, c. C-8, s.40.

[26] Badgley Report, Vol. 1 at 549.

[27] The bills and their proposers were Bill C-207, 30th Parl., 3rd Sess., 1977 (Mr. McGrath); Bill C-239, 30th Parl., 3rd Sess., 1977 (Mr. Whiteway); Bill C-241, 30th Parl., 3rd Sess., 1977 (Mr. Dinsdale); Bill C-318, 30th Parl., 3rd Sess., 1977 (Mr. Epp); Bill C-325, 30th Parl., 3rd Sess., 1977 (Mrs. Appolloni); Bill C-348, 30th Parl., 3rd Sess., 1977 (Mr. Friesen), Bill C-399, 30th Parl., 3rd Sess., 1977 (Mrs. Appolloni); Bill C-400, 30th Parl., 3rd Sess., 1977 (Mr. Reid); Bill C-402, 30th Parl., 3rd Sess., 1977 (Mr. Lawrence).

[28] Bill C-206; 30th Parl., 3rd Sess., 1977 (Mr. Epp).

[29] House of Commons Standing Committee on Justice and Legal Affairs, Third Report, *Pornography*, (1978) Proceedings No. 18 at 18:4.

[30] House of Commons Standing Committee on Justice and Legal Affairs, Third Report, *Pornography*, (1978) Recommendation 4, at 18:8.

[31] Bill C-21, First reading November 21, 1978, s. 18.

[32] The bill provided for a new subsection 159(10), stipulating that "where an accused is tried for an offence under this section, no opinion evidence is admissible with respect to community standards in order to prove that any matter or thing is or is not obscene, any law or practice to the contrary notwithstanding."

[33] House of Commons Standing Committee on Justice and Legal Affairs, Third Report, *Pornography*, (1978) Recommendation 8, at 18:10.

[34] *Martin's Criminal Code*, 1984, at 867.

[35] *Young Offenders Act*, S.C. 1980-81-82, c.110, s.2(1).

[36] *Ibid.*, s.72.

[37] *Criminal Code*, s.453(1)(e).

[38] *Ibid.*, s.453(1)(f).

[39] *Ibid.*, s.453(1)(g).

[40] *Young Offenders Act*, S.C. 1980-81-82, c.110, s.9(10)(b).

[41] R.S.C. 1970, c. J-3, s.10(1).

[42] *R. v. P.* (1979), 48 C.C.C. (2d) 390 (Ont. Prov. Ct.).

[43] *R. v. Wowk* (1981), 61 C.C.C. (2d) 394 (Man. Prov. Ct.).

[44] *Young Offenders Act*, S.C. 1980-81-82, c.110, s.9(9).

[45] *Criminal Code*, s.146(1).

[46] *Ibid.*, s.140.

[47] *Ibid.*, s.146(2).

[48] *Ibid.*, s.155.

[49] *Ibid.*, s.157.

[50] *Ibid.*, s.158.

[51] *R. v. Dudak* (1978), 41 C.C.C. (2d) 31 (B.C.C.A.).

[52] *R. v. DiPaola; R. v. Palactics* (1978), 43 C.C.C. (2d) 199 (Ont. C.A.).

[53] S.N.B. 1980, c. 2.1, s.31(1)(e).

[54] *Ibid.*, s.58(1).

[55] *Ibid.*, s.58(6).

[56] S.Q. 1977, c.20, s.54(6) and s.60, respectively.

[57] House of Commons Standing Committee on Justice and Legal Affairs, *Pornography*, (1978) Proceedings 18, Recommendation 7, at 18:9-10.

[58] *Ibid.*, at 18:9.

Chapter 44

International Obligations and Instruments

1. Pornography

The United Nations adopted the *Agreement for the Suppression of the Circulation of Obscene Publications* in 1910. In 1949, this Agreement was brought under the umbrella of the United Nations. The 1910 Agreement created duties on member states to centralize information in order to facilitate the tracing and suppression of actions of an international character which constitute infringement of states' domestic laws on obscene writings, drawings, pictures or articles. They are also to supply information on the importation of such publications or articles and to ensure or expedite their seizure. There is no definition in the Agreement of the term "obscene".[1]

A second agreement signed in 1923, and amended in 1947, is the *International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*. This Convention is concerned with the discovery, prosecution, and punishment by member states of those involved in a wide range of offences. All of these offences relate to "obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, films or other obscene objects", but neither does this Convention define the term obscene.[2]

Canada is a member of the Universal Postal Union, whose goals are to ensure the freedom of transit of mail throughout its territory; to secure the organization and improvement of postal services, and to provide technical assistance to member states. The *Universal Postal Convention* lays down detailed regulations as to how these goals will be attained. Article 33.2 of the Convention lists various articles prohibited for insertion into letter post items. "Obscene or immoral" articles are included as subsection (e) of the Article, and Article 33.4 provides that these "shall in no circumstances be forwarded to this destination, delivered to the addressees or returned to origin." Article 34 of the Convention authorizes postal administrations of the countries of origin and destination to submit to Customs control, according to the legislation of those countries, letter post items and, if necessary, officially to open them.[3]

Canada is also a member of the International Telecommunications Union. The first *International Telecommunications Convention*, signed in Madrid in

1932, set up the Union. It provided that the signing governments reserve the right to stop the transmission of any private telegram or radiotelegram which might appear dangerous to the safety of the state or contrary to the laws of the country, to public order, or to decency. This provision also applied to telephone communications. A second Convention was adopted in Montreux in 1965 and revised in Malaga-Torremolinos in 1973, an overhaul made necessary by the profound change in telecommunications methods and capacities. Whereas the provision for stoppage of telegrams described above was carried over into Article 19.1 of the new Convention, the provision relating to telephones was broadened to cover "telecommunications". Article 19.2 of the new Convention thus provides that members also reserve the right to cut off any private telecommunications which may appear dangerous to the security of the state or contrary to their laws, to public order or to decency.[4]

Canada adheres to these Conventions, so that they do not present the same problems of policy as do those in the area of prostitution. However, they do pose problems of interpretation, because the terms "obscene" and "decency" are not defined. This terminology problem becomes even more troublesome when one considers Resolution 1983/30 of the U.N. Economic and Social Council, passed in response to the Report of M. Jean Fernand-Laurent, Special Rapporteur on *The Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*.

Clause 3(d) of Resolution 1983/30 recommends that member states draw up legislation and policies aimed at curbing the "pornography industry and the trade in pornography and penalizing them very severely when minors are involved". Interestingly, this is the first reference relating specifically to minors which can be found in the international instruments in this field. Unfortunately, there is no definition of "pornography" in this resolution. Turning to the Report of the Special Rapporteur, we find the following description of "pornography" involving children, in paragraph 30:

> In some industrialized countries, child prostitution has recently been organized to benefit the pornography industry, which produces photo albums, films and video cassettes. Children are photographed or filmed in indecent positions, and these pictures are sold for high prices through a clandestine network of persons interested in such things. This trade may be national or international.[5]

In discussing the role of UNESCO in combatting prostitution, the Special Rapporteur calls upon the General Conference of that body to invite member states:

> ...to recognize the necessary distinction between the erotic and the obscene, and to declare war on pornography at least, which is most likely to defile the female body and which, by separating sexual relations from affective relations, puts them at a less then human level.[6]

This commentary, while it assists the reader to understand the Special Rapporteur's position, really does little to clarify the problems of terminology in Resolution 1983/30.

U.N. General Assembly Resolution 38/107, passed in response to the Report of the Special Rapporteur, does not address the issue of pornography.

The 1959 *Declaration of the Rights of the Child* does contain a principle which has relevance to the issue of children and pornography. Principle 9 provides that the child shall be protected from all forms of exploitation, and shall not be the subject of traffic, in any form. The Principle also stipulates that the child shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Once again, as in the case of prostitution, it would appear that Canada is missing a chance to assume a leadership role in international circles by not adopting the Universal Declaration.

2. Prostitution

Canada has signed and is a party to a number of international Conventions relating to aspects of prostitution (see Part III, Section II, Chapter 33). Here, however, it will be useful to focus on the provisions relating particularly to children and young persons.[7]

Canada is a party to the first international agreement on prostitution, signed in 1904. The *Agreement for the Suppression of the White Slave Traffic* was mainly concerned with the procuring of women or girls for immoral purposes abroad. It sets up a series of arrangements whereby governments will increase their surveillance at railway stations, ports and en route; arrange for the repatriation of prostitutes, and take a number of other measures aimed at curbing the international traffic.[8]

Canada is also a party to the *International Convention on the Suppression of the White Slave Traffic, 1910*, and the *International Convention for the Suppression of the Traffic in Women and Children, 1921*. The 1910 Convention states that whoever procured, enticed or led away, even with her consent, a woman or girl under age for immoral purposes shall be punished. The 1921 Convention established that the age limit for the purposes of the 1910 Convention would be 21 completed years. It also established that the protection of the 1904 Agreement and 1910 Convention would be extended to children of both sexes. Canada is also a party to the *Protocol to amend the Convention for the Suppression of the Traffic in Women and Children* of 1921, signed in 1947, transferring the powers in the Convention to the Secretary-General and participating countries of the United Nations.[9]

None of these Conventions actually addresses prostitution *per se*. Rather, they concentrate on "trafficking" in women and children. The first, and indeed only, U.N. Convention to deal with prostitution itself in a comprehensive way, is the *Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*. Adopted by the General Assembly in 1949, it came into effect on July 25, 1951. The preamble states that

> ...prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family, and the community...[10]

Of significance in this Convention is the adoption of the word "person" rather than "women". It is recognized here, for the first time, that prostitution is not restricted to women, but applies to all persons, even though its practice and exploitation particularly afflict women. Importantly, the use of the word "person" includes children as well as adults. Articles 1 and 2 provide that the parties to the Convention agree to punish any person who, to gratify the passions of another, procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; or exploits the prostitution of another person, even with the consent of that person. Further, the parties to the Convention agree to punish any person who keeps or manages, or knowingly finances or takes part in the financing of a brothel; or knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.[11]

In these two articles and in articles 6 and 16, the signing parties agree to restrict repressive measures to those who "exploit the prostitution of others" (i.e., pimps and other procurers). While the Convention considers prostitution to be an evil, Article 6 recognizes that those who prostitute themselves should not be subject to special registration or to any exceptional requirements for supervision or notification. Furthermore, in Article 16 signatory states agree to take or to encourage, through their public or private educational, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution.

No other Convention on prostitution has been developed by the international community since this one. Canada has not ratified the 1951 Convention.[12] Nor has Canada adopted the 1959 *Declaration of the Rights of the Child*.[13]

The Mexico World Conference of the International Women's Year in 1975 was the first of several U.N. forums that urged governments to adopt the 1951 Convention. As already noted, the U.N. Commission on the Status of Women persuaded, in 1982, the U.N. Secretary General to appoint a Special Rapporteur, M. Jean Fernand-Laurent, to examine the issues of suppression of traffic in persons and the exploitation of the prostitution of others. His report, submitted in March of 1983, focused on a number of issues of special relevance to the prostitution of young persons.[14]

In Chapter 1, the Special Rapporteur recites his findings concerning prostitution. In describing the activities of procurers, he points out that when it comes to the prostitution of children, it can be an older child who runs the business.[15] The Report discusses the various means that are used to recruit young people into prostitution. It should be noted that the Rapporteur was looking at the global scene when formulating these observations. However, the following remarks may be instructive for Canadians:

> There is no doubt that in the slum belts of certain large cities, children sometimes have no other choice in order to survive but to pick through garbage, beg, steal or become prostitutes. But adults - paedophiles or procurers - often take the initiative by offering money or gifts. In depressed rural areas, where the helpless peasant families are heavily in debt to a usurer, the children are sometimes bought or rented by a procurer from their parents, who may or may not be aware of their ultimate fate. If the child is an orphan, an abandoned child, a runaway or temporarily separated from his parents by some catastrophe, he is especially vulnerable and can simply be kidnapped. Paedophile tourists may be involved.[16]

The Report describes the phenomenon of the package "sex tour" in which the services of a prostitute are included in the price paid for the ticket; such phenomena are said to encourage the prostitution of young children, particularly in South-East Asia and Africa.[17]

The Rapporteur makes a number of recommendations for national governments and international organizations. The Report takes the position that a realistic goal is to combat procuring now and in the short term, while aiming in the long term at reducing actual prostitution.[18]

On the subject of child prostitution, the Report calls for dissemination of information and sensitization of public opinion as the most effective means of in-depth action. In particular, it recommends publicizing findings of physicians and medical associations on the lasting dangers to children's minds and bodies caused by sexual acts imposed on them by adults, and on the social cost of such traumas. The Report recommends that parents be informed of the risks associated with sexual abuse of youngsters, and that there be an increase in the number of teachers in what it calls "open environments" - youth clubs, sport clubs, and health clubs.[19]

M. Fernand-Laurent points out, however, that the campaign against prostitution and its physical and mental consequences, particularly among boys and girls, should not be restricted to the medical approach. It is also necessary to develop rehabilitative programs.[20] In this connection, particularly, he mentions the program of studies on "street children and street youth" sponsored by the International Catholic Child Bureau, begun in 1982, which should culminate in a publication proposing a program and methods for preventive action.[21]

The report highlights the position taken by the Secretariat of UNESCO that prostitution in general and the exploitation involved, are revealing of the image of women in the collective thinking of society. Accordingly, UNESCO is focusing attention on moral education, in order to arm children against manipulation of their minds by the media. Pointing out that "stereotypes that debase women and present them as being destined for physical pleasure of men are projected by magazines, advertising and the various cultural industries" the special Rapporteur cites the declaration of UNESCO's medium-term plan[22] that:

> It might henceforth be one of the essential functions of educational institutions to help young people to bring their critical faculty to bear in selecting and sorting the messages spread abroad by the communication media.[23]

On the legislative level, the Report calls for stiffer penalties for procuring. Specifically with regard to children, it urges that the exploitation of child prostitution should carry sanctions at least as severe as those applied to the crime of sexual abuse of a minor.

Following the presentation to it of the Special Report, the Economic and Social Council passed Resolution 1983/30, again inviting U.N. member states to ratify and implement the *1951 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*.[24] The Resolution also recommended that states draw up legislation and policies in keeping with the report of the Special Rapporteur. Among those recommended were several with particular relevance to child prostitution. The Resolution recommended that states punish all forms of procuring in such a way as to deter it, particularly when it exploits minors, and that they aim at preventing prostitution through moral education and civics training in and out of school. In keeping with the emphasis of the 1951 Convention, and the report of the Special Rapporteur, Resolution 1983/30 recommended that states eliminate discrimination that ostracizes prostitutes and makes their reabsorption into society more difficult, and that states facilitate occupational training and reintegration into society of persons leaving prostitution.

The U.N. General Assembly referred to Resolution 1983/30 of the Economic and Social Council when it, in turn, passed a Resolution dealing with the prevention of prostitution. Resolution 38/107 of the General Assembly recites that:

> ...prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the state ... and that women and children are still all too often victims of physical abuse and sexual exploitation.[25]

It urges member states to take all appropriate humane measures, including legislation, to combat prostitution, exploitation of the prostitution of others and all forms of traffic in persons, and appeals to member states to provide special protection directed towards rehabilitating victims of prostitution through measures including education, social guarantees and employment opportunities.

Canada, along with 24 other countries, abstained from voting on this Resolution. It seems that Canada's abstention was, in part, related to its view that the resolution dealt only with women and in part, because of concern over the issue of child prostitution.[26] While we find these reasons somewhat perplexing in the light of the text of the Resolution, we nevertheless believe that the thrust of the Resolution coincides very closely with the action that we think is appropriate with respect to children and prostitution.

Although Canada has not signed the 1951 Convention on prostitution, it is a party to the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women,*[27] which provides in Article 6 that state parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

It seems unfortunate that Canada has not ratified the 1959 *Declaration of the Rights of the Child*. It would appear that national legislation does not diverge significantly from the position of this international instrument. Thus, formal adherence to it would not be burdensome for Canada, and would, moreover, permit Canada to take a stronger role in international forums addressing the issue of, for example, child prostitution. The timing for the assumption of a clear leadership role in this area is opportune.

Recommendation 69

Canada should ratify the 1959 Declaration of the Rights of the Child.

Footnotes

[1] House of Commons Standing Committee on Justice and Legal Affairs, *Pornography*, (1978), Proceedings 18, Recommendation 7, at 12.

[2] *Ibid.*, at 12-13.

[3] *Ibid.*, at 13.

[4] *Ibid.*, at 14.

[5] U.N. Economic and Social Council, Report of Fernand-Laurent, para. 30, p. 10 (in Sansfaçon, *op. cit.*, note 7, Appendix 4).

[6] *Ibid.*, para. 95, p. 32.

[7] This account of the international instruments is taken largely from D. Sansfaçon, *United Nations Conventions, Agreements and Resolutions on Prostitution and Pornography* W.P.P.P. #3.

[8] *Ibid.*, at 2 and 9.

[9] *Ibid.*, at 3 and 9.

[10] *Ibid.*, Appendix 1, at 19.

[11] *Ibid.*, at 4.

[12] *Ibid.*, at 4 and 9.

[13] The United Nations General Assembly adopted the Declaration unanimously on November 20, 1959.

[14] U.N. Economic and Social Council, Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the suppression of the traffic in persons and the exploitation of the prostitution of others, March 17, 1983, Document E/1983/7. A portion of the Report is included in Sansfaçon, *op. cit.*, Appendix 4.

[15] Sansfaçon, *op. cit.*, Appendix 4 para. 19 at 7.

[16] *Ibid.*, Appendix 4, para. 29, at 9.

[17] *Ibid.*, Appendix 4, paras. 30 and 31, p. 10.

[18] *Ibid.*, Appendix 4, para. 63, p. 18.

[19] *Ibid.*, Appendix 4, para. 68.

[20] U.N. Economic and Social Council, Report of Mr. Jean Fernand-Laurent, Special Rapporteur on the Suppression of the traffic in persons and the exploitation of the prostitution of others, March 17, 1983, Document E/1983/7 para. 68 at 32.

[21] *Ibid.*, para. 102, at 35-36.

[22] 1984-89; adopted in November, 1982. U.N. Economic and Social Council, Report of Fernand-Laurent, para. 95, at 31 and fn 42.

[23] *Ibid.*

[24] The text will be found in Sansfaçon, *op. cit.*, Appendix 3 at 37.

[25] U.N. General Assembly, Thirty-eighth session, Resolution Adopted by the General Assembly: 38/107 Prevention of Prostitution, Document A/RES/38/107, February 3, 1984.

[26] Sansfaçon, *op. cit.* at 11.

[27] *Ibid.*, Appendix 2, at 27.

Chapter 45

Other Countries

The experience of other countries in the regulation and control of pornography and prostitution is discussed at length elsewhere in this Report. Here, we present for comparative purposes, the experience of the United States and the United Kingdom, in addressing these issues as they relate to children.

1. Pornography

1.1 United States

The *Child Protection Act*, Chapter 110 of Title 18 of the *United States Code*, is a federal statute dealing with the exploitation of children for pornography which is transported in interstate or foreign commerce, or mailed. Because the individual states possess the constitutional jurisdiction over the criminal law, the U.S. federal government's main initiative against involvement of children in pornography comes in this *Act*. In 1984, the *Act* was amended in the hope of increasing substantially its impact on what the amending *Act* described as "a highly organized multi-million dollar industry which operates on a nationwide scale".[1]

Paragraph 2251(a) of Chapter 110 is directed against any person who:

> employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Paragraph 2251(b) is directed against:

> any parent, legal guardian or person having custody or control of a minor who knowingly permits such minor to engage in or to assist any other person to engage in, sexually explicit conduct for the purpose of producing any visual depiction of such conduct.

Because of the constitutional arrangement in the U.S., the offence consists of engaging in this conduct if the person knows or has reason to know that the visual depiction will be transported in interstate or foreign commerce, or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce, or mailed.

On the first conviction, the person engaging in such conduct shall be fined not more than $100,000, or imprisoned not more than 10 years. Any organization committing a violation shall be fined not more than $250,000. The amendments of 1984 added for the first time this criminal liability for the organization; they also increased the fines for individuals from $10,000 to $100,000. The maximum fine for the second or subsequent conviction is $250,000. This fine, too, was increased from $15,000 by the 1984 amendments. The jail term for someone with a prior conviction under the section is not less than two nor more than 15 years.

Subject to the same penalties is any one who:

> 1) knowingly transports or ships in interstate or foreign commerce or mails any visual depiction, if:
>
> (A) the producing of such visual depiction involves the use of a minor engaged in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct; or
>
> 2) knowingly receives, or distributes, any visual depiction that has been transported or shipped in interstate or foreign commerce or mailed, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails if:
>
> (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and
>
> (B) such visual depiction is of such conduct;

A "minor" is any person under the age of 18 years, raised from 16 by the 1984 amendments. "Sexually explicit conduct" is defined as real or simulated sexual intercourse (including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex), bestiality, masturbation, sadistic or masochistic abuse or the lascivious exhibition of the genitals or pubic areas of any person.

Added to chapter 110 by the 1984 amendments was a new section 2253 providing that any person convicted of any offence under sections 2251 or 2252, shall forfeit to the government the person's interest in any property constituting or derived from the gross profits or other proceeds obtained from the offence, and any property used, or intended to be used, to commit the offence. This provision for "criminal forfeiture", is matched by a provision for "civil forfeiture" in section 2254 of Chapter 110, also enacted by the 1984 amendments. The "civil forfeiture" section provides that the following kinds of material are liable to forfeiture: firstly, any material used, or intended for use, in producing, reproducing, transporting, shipping or receiving any visual depiction in violation of the chapter; secondly, any visual depiction produced, transported, shipped or received in violation of chapter 110, and thirdly, any property constituting or derived from gross profits or other proceeds obtained from a violation of the chapter.

In two decisions of the United States Supreme Court, important findings are made concerning the right of the state to deal with pornography and children.

At issue in *Federal Communications Commission* v. *Pacifica Foundation*[2] was the constitutional validity of an F.C.C. ruling that it was wrongful to broadcast over the radio, during the afternoon period, the George Carlin monologue "Dirty Words". The Commission cited four reasons why it believed broadcast messages deserved special treatment. One was that children have access to radios and in many cases are unsupervised by parents while listening to them. The Commission said this reason was "of special concern" to it and to parents.

The Commission placed a warning letter in the file of Pacifica Broadcasting as a result of the Carlin incident, and the Supreme Court held that this decision did not violate Pacifica's First Amendment rights. An essential element in the Court's holding was the proposition of American constitutional law that, of all forms of communication, it is broadcasting which has received the most limited First Amendment protection. One of the reasons for such limited protection, cited by Mr. Justice Stevens for the Court, was that broadcasting is uniquely accessible to children, even those too young to read.[3] The ease with which children may obtain access to broadcast material, coupled with the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household, were said by the Court amply to justify special treatment of indecent broadcasting.[4]

As mentioned previously, the states have jurisdiction over criminal law in the United States Constitution. A significant case dealing with the reach of permissible state action vis-a-vis children and pornography was *New York* v. *Ferber*.[5] In that case, the Supreme Court held that "the States are entitled to greater leeway in the regulation of pornographic depictions of children"[6] for five reasons. Firstly, the state's interest in protecting children from sexual abuse and exploitation is of surpassing importance. Secondly, the distribution of pornographic films depicting children is intrinsically related to the sexual abuse of children, because the materials are a permanent record of the abuse; the harm to the child is increased by their circulation, and because the distribution of such materials provides the impetus for the child abuse involved in producing them. Thirdly, the advertising and selling of pornographic material involving children provides an economic motive for the production of these materials. Fourthly, the value of permitting live performances or representations of children engaged in sexual activity is minimal. And fifthly, classifying child pornography as outside the First Amendment guarantee of freedom of speech is not inconsistent with prior Supreme Court decisions in the area.

In *Ferber*, the Court also addressed the standard to be met when determining whether material portraying children is obscene. It did so with reference to the test enunciated in *Miller* v. *California*,[7] a test which has now been adopted with some modifications in the criminal statutes of 43 states.[8] The Supreme Court declared in *Miller* that the basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[9]

In *Ferber*, the Supreme Court noted that where pornography involving portrayals of children is under review, the *Miller* formulation is adjusted in the following respects:

> A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.[10]

However, the type of works to be prohibited by the statute must be adequately defined, as must the type of "sexual conduct" proscribed.

At issue in *Ferber* was the New York statute on sexual performance by a child,[11] first enacted in 1977. One provision of Article 263 criminalizes the use of a child less than 16 years of age in a sexual performance. A person is guilty of the offence if, knowing the character and content of the performance, he employs, authorizes or induces the child to engage in it, or being a parent, legal guardian or custodian of the child, consents to his or her participation. At issue in the *Ferber* case was a second provision of Article 263, providing that a person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child under 16.

The definition of "promote" was very broad, including procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, publish, distribute, and a number of other activities. The definition of "sexual performance" was so wide as to include much material which would not have been regarded as obscene under the *Miller* test. It included actual or simulated sexual intercourse, deviant sexual intercourse, bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.

This decision was the first in which the Court examined a statute directed to depictions of sexual activity involving children. Its significance can be appreciated when one considers that at the time *Ferber* was heard, the Court observed that 20 states had prohibited the distribution of material depicting children engaged in sexual conduct, regardless of whether the material was obscene.

It is beyond the scope of this study to document the state laws in the various United States jurisdictions dealing with child pornography and dissemination of pornography to minors. The diversity of laws from state to state, and even within the various states makes such an undertaking difficult. What is striking to the observer of American law and policy in this area, is the wide discrepancy between what is alleged to be the problem in the area of child pornography, and what appear to be the inroads made in solving it.

Section 2 of the *Child Protection Act* of 1984[12] recites the Congressional finding that "child pornography has developed into a highly organized, multimillion dollar industry which operates on a nation wide scale" and "thousands of children including large numbers of runaway and homeless youth are exploited in the production and distribution of pornographic materials." By contrast, this Committee learned that in the fiscal 1978-79, the U.S. Department of Justice obtained the convictions of 24 defendants on obscenity charges, 13 of whom were distributors of child pornography. In 1979-80, 8 of the 20 defendants successfully prosecuted by the Department were distributors of child pornography, and in 1980-81, half of the 18 convicted defendants were convicted on charges involving child pornography.[13] These statistics, of course, cannot reveal the whole pattern of enforcement activity. What seems significant, however, is that while child pornography convictions represent about half of the total number of convictions, the total number of convictions is strikingly small.

1.2 United Kingdom

The general outlines of the laws of the United Kingdom relating to pornography have been given elsewhere in our Report (see Part II, Section III, Chapter 17). Here we examine certain features of that law which have particular reference to young persons.

The *Children and Young Persons (Harmful Publications) Act, 1955*,[14] was a reaction to the entry into Britain, especially in 1954, of a new wave of horror comics produced in the United States. The *Act* applies to any book, magazine or other similar work which is of a kind likely to fall into the hands of children or young persons, and which consists wholly or mainly of stories told in pictures, with or without the addition of written matter, portraying the commission of crimes, acts of violence or cruelty, or incidents of a repulsive or horrible nature, in such a way that the work as a whole would tend to corrupt a child or young person into whose hands it might fall.

The *Act* provides that a person who prints, publishes, sells, lets on hire or possesses, for any of these purposes, a work to which the *Act* applies, shall be guilty of a summary conviction offence. The penalty is imprisonment for up to four months, or a fine not exceeding '100, or both. The *Act* provides that a Justice of the Peace may issue a warrant authorizing the seizure of offending publications from the premises of one charged with an offence, and it further provides for the forfeiture of copies of the work, and any plate or film prepared for the purpose of making copies of it, which are in the possession of a person convicted under the *Act*. No prosecution may be brought except by, or with the consent of, the Attorney General. Although the *Act* provided that it was to have expired at the end of December, 1965, it was renewed by the *Expiring Laws Act* of 1969 and remains in force today.

The *Protection of Children Act, 1978*,[15] was passed to prevent children being involved in the production of pornography. The *Act* provides that it is an offence for a person to take, or permit to be taken, any indecent photograph of a child, to distribute or show such indecent photographs, to have in his possession such indecent photographs with a view to their being distributed or shown to himself or others, or to publish, or cause to be published, any advertisement likely to be understood as conveying that the advertiser distributes or shows such indecent photographs or intends to. "Child" means a person under the age of 16, and the *Act* makes it clear that distribution need not be for gain. A person is to be regarded as distributing an indecent photograph if he parts with possession of it to, or exposes or offers it for acquisition by, another person. Prosecution under the *Act* may be by way of indictment or by way of summary proceedings. If convicted on indictment, a person is liable to imprisonment for not more than three years, to a fine or to both. A person convicted summarily shall be liable to imprisonment for a term not exceeding six months or a fine not exceeding £1,000 or to both.

A Justice of the Peace may authorize seizure of articles which are, or are believed with reasonable cause to be, or include indecent photographs of children taken or shown on the premises, or kept there with a view to their being distributed or shown. The occupier of the premises must then show cause why the articles should not be forfeit.

In July, 1977, the Committee on Obscenity and Film Censorship, under the Chairmanship of Bernard Williams, was appointed by the Home Secretary to review the laws concerning obscenity, indecency and violence in publications, displays and entertainments and the arrangements for censorship in England and Wales. Excluded from the Committee's mandate was the field of broadcasting because the Annan Committee review of the whole field of broadcasting had been completed only the preceding February.

The *Protection of Children Act, 1978*, discussed above, was enacted by Parliament while the Williams Committee was sitting. It was introduced as a Private Member's bill and approved by Parliament, though with substantial amendments made by the government, to meet a public demand for action to prevent the use of children in pornography.[16]

The Williams Committee devoted very little of its report to a specific consideration of pornography and children. Although it had been set up at least, in part, as a response to public concern about an increasing use of children in pornography, it observed that no evidence was put before it that child pornography was a growing problem.[17] It observed that the new *Protection of Children Act, 1978* had been used in "only a very few cases" between the time of its passage and the publication of the Committee's report.[18]

The Committee records a certain caution about how susceptible children might be to the influence of pornography; its caution is predicated on the absence of experimental evidence, because for obvious reasons, children are not used in such experiments. Moreover, the Committee states that it heard no evidence of actual harm being caused to children.[19]

The Committee observed that it was clear from its discussions with witnesses that no very definite answer could be given about the age at which special protection of children is no longer necessary. It recorded that some witnesses declined to offer any view at all as to the age at which special protection should cease. The choice of others tended to hover between the ages of 16 and 18. The main determinant of the various views was the witness's idea about when individual sexual maturation might take place, so as to enable a young person to cope with exposure to pornography.[20]

The Committee is much more definite when it deals with the issue of the use of children to make pornography. Its report states:

> Few people would be prepared to take the risk where children are concerned and just as the law recognizes that children should be protected against sexual behaviour which they are too young to properly consent to, it is almost universally agreed that this should apply to participation in pornography.[21]

The Committee observes that participation in pornography will often involve the commission of offences like indecent assault, but recommends strongly that the problem of children's participation in pornography should not be left to the law of sexual offences. It observes:

> ...there are strong arguments that the prevention of this harm also requires the power to suppress the pornographic product as well as the original act, so as not to provide the incentive to pornographers to flout the sexual offence law, or to deal without inhibition in products which are imported from other legal jurisdictions.[22]

The Committee urges against a parochial approach to the prevention of harm to children, arguing "if English law is to protect children against offences in this country, it is hypocritical to permit the trade in photographs and films of the same activity taken overseas."[23]

The Williams Committee proposed an entirely new and comprehensive approach to the control of offensive material. The principles on which the scheme was structured were well defined. Firstly, the Committee argued that the law should rest partly on the basis of harms caused by, or involved in the existence of, the material. Only these harms could justify prohibitions. The law should also rest partly on the public's legitimate interest in not being offended by the display and availability of material. This interest, in the Committee's view, would justify restrictions designed to protect the ordinary citizen from unreasonable offence.[24] The Committee believed that the principal object of the law should be to prevent certain kinds of material causing offence to reasonable people or being made available to young people.

The Committee divided material into two classes, that subject to restrictions and that subject to prohibitions. Prohibited material includes photographs and films whose production appears to the court to have involved the exploitation for sexual purposes, of a person appearing from the evidence as a whole, to have been at the relevant time under the age of 16. The law should explicitly state that consent by a person under 16 is not a defence.[25] The

Committee recommended that it should be an offence to take any prohibited photograph or film, to distribute or show it, to have it with a view to its being distributed or shown, or to advertise it as being available for distribution or showing.[26] The offence would carry a maximum term of three years' imprisonment and an unlimited fine.

The Committee recommended[27] that the police have power to obtain a warrant for the seizure of material they believe to be prohibited, which is being kept in circumstances in which the police believe an offence is being committed. The court convicting a person of an offence involving prohibited material, should order that any material seized, which is in their view prohibited material, should be forfeited. However, the Committee recommended that there not be any procedure aimed at the forfeiture of prohibited material, separate from the criminal proceedings.

Prohibited material was to be prohibited from circulation in the post, and should be included in the list of goods prohibited from importation.

The Committee also considered that live performances, which involve the sexual exploitation of any person under the age of 16, should be prohibited. They recommend that it should be an offence to present, organize or take part in a performance which contravenes the prohibition. Although they do not specifically provide this exemption, it seems clear from the tenor of their remarks on this subject that the Committee would not be in favour of prosecuting the child participant himself or herself. The Committee does recommend, by way of exception, that the law should not be so framed as to apply to what is performed in a private house, so long as no person under 18 is present and no admission charge is made.

The Committee recommends that no prohibitions or restrictions should apply to the printed word. It proposes that restrictions should apply to matter other than the written word, and to a performance, whose unrestricted availability is offensive to reasonable people by reason of the manner in which it portrays, deals with or relates to violence, cruelty or horror, or sexual, faecal or urinary functions or genital organs.

Restriction is to consist in a ban on the display, sale, or hire of restricted material and on the presentation of restricted performances, other than in premises to which persons under the age of 18 are not admitted; to which access is possible only by posting a prominent warning notice in specified terms, and which make no display visible to persons not passing beyond the notice.

The Committee proposes that it be an offence to display, sell, or hire any restricted matter or to present a restricted performance in contravention of the restrictions laid down. Moreover, it would be an offence to send or deliver restricted material or advertisements for such material to a person who the sender knew, or ought reasonably to have known, was under the age of 18.

Interestingly, however, the Committee specifically provides that it should not be an offence for a person under the age of 18 to seek to gain entry to premises in which restricted material is being displayed, sold, or hired, or in which a restricted performance is being presented, or to order restricted material to be sent to him or her.

The Committee's proposals with respect to restricted material do not apply to films, because a separate film censorship regime is proposed. A Statutory Film Examining Board would take over the censorship powers of local authorities and the functions exercised by the British Board of Film Censors. The Board's examiners should allocate films to one of the following six categories: suitable for all ages; children under the age of 11 should be accompanied by a responsible adult; no person under the age of 16 to be admitted; no person under the age of 18 to be admitted; and for restricted exhibition (also forbidden to those under 18). A film would be refused a certificate altogether if it is unfit for public exhibition because it contains material prohibited by law, or is unacceptable because of the manner in which it depicts violence or sexual activity or crime, notwithstanding the importance of allowing the development of artistic expression and of not suppressing truth or reality.

The Committee recommends that in determining whether films are suitable to be shown to those under 18, the Board should take account of the protection of children and young persons from influences which may be disturbing or harmful to them, or from material whose unrestricted availability to them would be unacceptable to responsible parents. It would be an offence, punishable by fines of up to £1,000, to show an unclassified film or to show a film in a manner not in compliance with its classification. The Committee recommends, however, that it should not be an offence for a person under the age of 18 to seek to gain entry to a film designated as unsuitable for persons of that age.

The Williams Committee Report was delivered to the British government in November, 1979. The government largely ignored its recommendations, with the first legislative activity in relation to pornography coming in 1981, as a result of a Private Member's bill. The *Indecent Displays Control Act, 1981*,[28] provides that if any indecent matter is publicly displayed, the person making the display and any person causing or permitting the display to be made, shall be guilty of an offence. A display in a place for which the public must pay an admission fee, or in a shop to which access can be had only after passing by a warning sign, are not caught by the *Act*, provided that persons under the age of 18 years are not permitted to enter while the displays are continuing.

The most recent initiative of the British government is the *Video Recordings Act, 1984*.[29] This legislation establishes a classification regime for video works. The only such works exempt from the scheme will be those which, taken as a whole, are designed to inform, educate or instruct; or are concerned with sport, religion or music. Video games are also exempt.

However, even video works in these exempt categories are not exempt if they are works which, "to a significant extent", depict "human sexual activity or acts of force or restraint associated with such activity", "mutilation or torture of, or other acts of gross violence towards, humans or animals", or "human genital organs or human urinary or excretory functions." Video works in the exempt categories which are "designed to any significant extent to stimulate or encourage" human sexual activity, or acts of force or restraint associated with such activity, or are designed to any extent to stimulate or encourage "mutilation or torture of, or other acts of gross violence towards humans or animals", are also caught by the scheme.

The *Act* allows the Secretary of State to designate an authority to classify video works which will be viewed in the home. The *Act* contemplates three separate classifications for such video works. The first category is for works which are suitable for general viewing and unrestricted supply, with or without advice as to the desirability of parental guidance with regard to the viewing of the work by young children or as to the particular suitability of the work for viewing by children. The second category is for works suitable for viewing only by persons who have attained the age (not being more than 18) specified in the classification certificate. The third is suitable for supply only through a licensed sex shop.

The *Act* provides that where a classification certificate states that no recording containing the particular work is to be supplied to a person who has not attained the age specified in the certificate, a person who supplies or offers to supply the work to a person under that age commits an offence. The defence to the charge is to prove that the accused neither knew nor had reasonable grounds to believe that the person concerned had not attained the age.

The regulatory system contemplated by the legislation has not yet been implemented, although the British Board of Film Censors has been designated as the certifying authority.

2. Prostitution

2.1 The United States

Legislation relating to child prostitution exists at both the federal and state level in the United States.[30]

For many years, the sole federal statute was the *Mann Act*, enacted in 1910 by Congress in the midst of the "white slavery scare".[31] Section 2432 of that *Act* made it an offence to transport or finance the transportation of a person under 18 in interstate or foreign commerce for the purpose of engaging in prostitution or "prohibited social contact for commercial purposes." As might be expected with legislation of that vintage, the *Act* referred solely to the exploitation of female minors.

In the late 1970s, after considerable discussion in the media and congressional hearings, the *Protection of Children Against Sexual Exploitation Act* of 1977[32] was passed. The major purpose of the legislation was to extend the protection offered by the *Mann Act* to male minors.

Despite the extension of the federal criminal law protection in this way, doubts exist as to the efficacy of the legislation.[33] While it has been employed effectively in the case of female victims, who are often controlled by pimps who will move them around, it is not effective in the case of young males, who, if they travel across state lines, do so of their own volition. Even in the case of females, however, conviction rates are minimal: 14 in 1980, 16 in 1981, and 8 in the first 9 months of 1982.[34]

A second federal legislative initiative in the field of juvenile prostitution is the *Child Abuse (Prevention and Treatment) and Adoption Reform Act* of 1974, as amended in 1978.[35] The latter amendments were significant because they defined social exploitation as a form of child abuse.

After further amendment in 1977 the statutory definition now reads:

> ...the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of eighteen, or the age specified by the child protection law of the State in question, by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby...[36]

Regulations under the *Act*, governing the eligibility of states for funds, define "social exploitation" as "allowing, permitting or encouraging a child to engage in prostitution, as defined by state law, by a person responsible for a child's welfare".[37] These regulations encourage the states to address "social exploitation", including juvenile prostitution.

A perceived weakness with this legislation, and in particular, the definitions under it, is that it focuses upon the involvement of parents and guardians in encouraging prostitution, but omits the influence of pimps for females and that of friends for males.[38] Moreover, in many instances, the decision by the young person to prostitute occurs only after he or she is "on the street". It is recognized, of course, that the legislation does have a vital role to play in allowing detection of child abuse by a parent or guardian, which may if not stopped lead to a drift into prostitution.[39]

A third piece of federal legislation which is relevant is the *Runaway and Homeless Youth Act*[40] which provides for the funding of shelters for runaway youths on a nationwide basis, and in the process, assists young prostitutes of both sexes who are runaways. Several runaway shelters with exemplary records have been funded under this program: especially *Bridge* in Boston, *The Shelter* in Seattle and *Huckleberry House* in San Francisco. The services provided include: attempts at family reunifications; short term residential care; medical screening; employment training; counselling for court referred youths; guidance on housing resources; counselling in self awareness, sociability, social identity, substance abuse and peer relations.[41] *Huckleberry House*, in particular, has developed a project related to an increase in prostitute clients, as well as those identified as gay or bisexual.[42]

This federal initiative in funding, which has helped to attract further public and private financial support, has both prevented runaways from turning to prostitution, and provided a crucial support system to those already engaged in it. Moreover, the educational and employment training programs have provided a way for young prostitutes to change their lifestyle and eventually, to leave the trade.[43] The level of funding for this program has been a matter of contention between the Reagan administration and Congress, but no appreciable cuts have been made.[44]

The fourth and final piece of federal legislation which bears on juvenile prostitution is the *Missing Children Act*[45] which establishes a national clearinghouse to facilitate identification of missing children, including runaways. As with the previous legislation discussed, the tracing of a child may prevent his or her induction into prostitution. It may also provide a means of finding young practising prostitutes and referring them to social service agencies, which can assist in assimilation back into the community.[46]

The legislation has some drawbacks, however, as far as juvenile prostitutes are concerned. In the first place, it involves a cumbersome and frustrating process for parents.[47] Secondly, it is of little value where, as is often the case with juvenile prostitutes, the runaways have been rejected by their families or have no stable family to worry about them. In these cases, they are all too often not reported as missing.[48] Finally, juveniles in this type of situation often tend to give false identification in order to cover their tracks.[49]

In the wake of the congressional hearings on the sexual exploitation of children in 1977, a proliferation of new or revised legislation on juvenile prostitution, both criminal and civil, emerged in the States. The criminal statutes are designed to punish adults who engage in acts of prostitution with young people, or pimps or procurers who exploit them.[50] The legislative provisions typically contain harsher penalties for those who patronize juvenile prostitutes, and the harshest penalties for pimps and procurers. Penalties are often increased where the exploiter uses force, threats or intimidation. The law also treats harshly those parents or guardians who promote prostitution by their own offspring or children in their custody.

In most state legislation, juveniles are characterized as victims and not penalized, although they may be subject to the penalties under juvenile delinquency statutes. There are also provisions which parallel the *Mann Act*, as amended, and are directed against transporting minors within the state for purposes of prostitution. Legislation diverges over whether a mistake of age is a valid defence, with some states adopting a strict liability approach, and others allowing the defence.

The civil enactments on juvenile prostitution typically relate to child abuse and the reporting of it. However, only a few states include sexual exploitation in their definition of child abuse.[51]

When it comes to enforcement, much of the potential in the wording of these state enactments remains unrealized.[52] Enforcement against pimps is woefully inadequate, despite the fact that the occasional vigorous exception proves that pimps can be neutralized by it.[53] The record of prosecuting customers is no better. As in the case of federal legislation, it is questionable how far it recognizes the differences in the social context between male and female prostitution. The defence of reasonable mistake, where recognized, is a very real impediment to successful prosecution. The civil legislation on the reporting of child abuse suffers from the limited focus on parent and guardian, which has already been discussed with regard to the equivalent federal legislation.

It is clear that a considerable amount of legislative activity in this area has taken place in the United States in the past 10 years. Progress has been made in clearly identifying juvenile prostitution as a serious social problem, and taking steps to combat it. However, with the exception perhaps of the federal legislation on runaways, which has generated some excellent lifetime programs, much of it is too narrow in ambit, or impervious to the social causes and context of prostitution to have a significant impact. It has been suggested by one writer that the States, in particular, need to commit themselves and their resources to identifying the causes of juvenile prostitution and the identification, prevention and treatment of sexual abuse.[54] The suggestion is also made that the parental rejection which causes many youths to run away should draw penalties, and that parental support obligations should be enforced, especially when parents refuse to take back a runaway.[55] Finally, the same writer calls for more inter- and intra-state co-operation on runaways and the provision of state funding for shelters, which are crucial to the welfare of runaways in general, and runaway prostitutes in particular.[56]

2.2 England and Wales

The process of discovering the law and practice in England and Wales on child prostitution requires an analysis of the criminal law, the law relating to juvenile delinquency and the child welfare system. The criminal provisions are stated quite simply in the *Street Offences* and *Sexual Offences Acts*.[57] Juvenile delinquency is the subject of the recent and controversial *Criminal Justice Act* of 1982.[58] Child welfare in general is governed by a system of local authority initiative and care under the aegis of the *Children and Young Persons Acts*.[59]

Assuming that a female child practising prostitution is above the age of criminal responsibility, which in England and Wales is set at 10 years, that person can be charged with soliciting or loitering as a common prostitute under section 1 of the *Street Offences Act*. A male would be subject to prosecution under the broader offence in section 32 of the *Sexual Offences Act* "to solicit or importune in a public place for immoral purposes".

It is a criminal offence under section 23 of the *Sexual Offences Act* to procure a female under the age of 21 "to have unlawful sexual intercourse in any part of the world with a third person".[60] "Unlawful sexual intercourse" presumably refers both to sexual acts, such as buggery, which are criminal with any person under 21, as well as to any sexual intercourse with a female under 16, with or without her consent (statutory rape).[61] The *Sexual Offences Act* also contains the offences of keeping a brothel and living on the earnings of a prostitute.[62] Neither offence limits its application to adult prostitution activity. Accordingly, the provisions must be taken as applying to juvenile prostitution as well. Moreover a child of over 10 and under 18 years could be charged with any of the "exploitation offences". While somewhat fanciful in the case of the brothel offence, it is not entirely unreal in the case of procuring and living on the earnings, especially in the case of 16 and 17 year olds.

The current system for responding to juvenile delinquency is one which is marked by conflicting philosophies. Until recently, the main philosophy of the system has been "treatment" rather than punishment. This type of regime is embodied in both the 1963 and 1969 *Child and Young Persons Act*.[63] The 1963 Act placed a duty on local authorities to provide services to families to prevent children being brought before a juvenile court.[64] The 1969 *Act* took this one step further by emphasizing that children were only to be brought to court when they could not be helped by other means.[65] For those brought to court, the Act specified, as the major means for dealing with them, a "supervision order" combined with what is called Intermediate Treatment (I.T.). Every area of the country is required to provide I.T. which is designed to provide positive guidance and activities for and stimulate new and beneficial attitudes in the subject of the supervision order.

Juvenile courts date from 1908 in England and Wales and are serviced by Magistrates (typically lay people). They are not open to the public. With some exceptions, they deal with juveniles up to and including the age of 16 years. A supervision order, prescribed by a juvenile court, places the juvenile under the supervision of the local authority, social worker or probation officer for up to three years.[66] Participation in I.T. may only be ordered if a scheme is locally available, and for a maximum period of 90 days during the currency of the supervision order.

An alternative to a supervision order is a care order committing the child to the care of the local authority which, after observation, decides where the juvenile should live and what treatment he or she should receive.[67] The options for care are: home; a foster home; a residential community home; or a secure community home.

For those who are considered in need of somewhat stiffer treatment, other options exist for the juvenile courts. In the case of a child between 10 and 17 who has been convicted of an offence which would be punishable by imprisonment in the case of an adult (including indecency between men, male soliciting and the exploitation offences), he or she may be ordered to attend, on a part-time basis, an attendance centre (where the emphasis is on physical fitness, citizenship training etc.).[68] Those between 14 and 17, who have committed such offences and are considered to need disciplinary treatment under a brisk, firm regime, can be sent to a custodial detention centre for 3 to 6 months.[69] Currently, these facilities are only available for males. In the case of an offence which is imprisonable for an adult, a juvenile may be fined, the parents usually be liable to pay. Moreover, parents or guardians may be bound over to take good care or exercise proper control of their offspring.

The *Criminal Justice Act* of 1982 reflects a somewhat different philosophy. It embodies the present British Government's view that more juvenile offenders need a "short, sharp shock". It makes it more attractive for magistrates to prescribe time in attendance at detention centres and these centres have been increased in number. Other changes include the extension to those 16 years old of a "community service order", previously confined to those of 17 years or more; and the investing of the courts with the power to specify the program of activities under a supervision order, including a "night restriction" or "curfew" order.[70]

Critics have pointed to the uneasy co-existence of elements of the former "welfare" regime and the new "law and order" philosophy.[71] While it is too early to assess the impact of the more draconian regime, it is clear that attendance at detention centre orders have increased. Based on past experience in which a recidivism rate of two thirds has been noted, the prognosis is said not to be good for these establishments.[72]

A juvenile, including a young prostitute, may of course not fall afoul of the criminal law, and yet may be the subject of the child welfare system.[73] A child of under 17 years of age, who is in need of care, may become the recipient of "voluntary" care by a local authority (voluntary because the parents may request the child's return); or of non-voluntary care, (where the judgment is made by the local authority that the welfare of the child already in care demands it and the parents or guardians are considered incapable of providing it); or be the subject of a "care order" sought by the local authority.[74] Among the reasons for granting such an order are that the child's proper development is being impaired or neglected or the individual is being ill-treated, or that he or she is exposed to moral danger. The latter typically involves moral danger in the sexual sense.

Law enforcement authorities in England and Wales do not see juvenile prostitution as a serious problem, although it undoubtedly exists to some extent. As in Canada, it is the runaway juveniles, who are close to 18 years old, who are the most problematic. The police are often of the view that it is pointless returning them to their homes. All they can do is to report the matter to the local authority, if they are concerned about the welfare of the child.[75]

Footnotes

[1] Public Law 98-292, May 21, 1984, s.2(1).

[2] 438 U.S. 1801 (1978).

[3] 438 U.S. 1801, at 749.

[4] 438 U.S. 1801, at 749-750.

[5] 458 U.S. 1113 (1982).

[6] 458 U.S. 1113, at 1122.

[7] 413 U.S. 15 (1973).

[8] D. Sansfaçon, *Pornography and Prostitution in the United States* W.P.P.P.#2 at 12.

[9] 413 U.S. 15, at 24.

[10] 458 U.S. 1113, at 1127.

[11] Penal Law, Article 263.

[12] See note 1.

[13] Sansfaçon, *op. cit.* at 23.

[14] U.K. 1955, c.28.

[15] U.K. 1978, c.37.

[16] Williams Report, para 2.28, at 19.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*, para. 6.67 at 89.

[20] *Ibid.*

[21] *Ibid.*, para. 6.68 at 90.

[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*, para. 9.7 and 10.2, at 114 and 130.

[25] *Ibid.*, para. 10.6, at 131-132.

[26] *Ibid.*, para. 10.13, at 134.

[27] For a summary of the Williams Report recommendations, see Chapter 13, at 159 ff.

[28] U.K. 1981, c.42.2

[29] U.K. 1984.

[30] This segment draws upon D. Weisberg, "Children of the Night: The Adequacy of Statutory Treatment of Juvenile Prostitution", (1984) 12 *Am. J. Crm. Law* 1.

[31] Ch. 395, 36 Stat. 825 (1910).

[32] 18 U.S.C. §§ 2251, 2253-2254 (1978).

[33] Weisberg, *op. cit.* at 50-51.

[34] *Ibid.*

[35] 42 U.S.C. § 5101 - 5106 (1974), as amended by *Child Abuse Prevention and Treatment and Adoption Reform Act*, 92 Stat. 205 (1978).

[36] 42 U.S.C. § 5102 (1977).

[37] 48 Fed. Reg. 3701, § 1340.2.

[38] Weisberg, *op. cit.* at 52.

[39] *Ibid.*, 53.

[40] Pub. L. No. 93-415, 88 Stat. 1109.43 (1974).

[41] Weisberg, *op. cit.* at 54-55.

[42] *Ibid.*, at 55-56.

[43] *Ibid.*, at 56.

[44] *Ibid.*, at 29.

[45] 28 U.S.C. § 534 (1982).

[46] Weisberg, *op. cit.* at 57.

[47] *Ibid.*

[48] *Ibid.*, at 57-58.

[49] *Ibid.*, at 58.

[50] *Ibid.*, at 39-47.

[51] *Ibid.*, at 47-49.

[52] *Ibid.*, at 59.

[53] *Ibid.*, at 60. Weisberg notes that in this research, the staff of a few law enforcement agencies (eg. Louisville, Kentucky; Minneapolis; Seattle) suggested that when police take time to be especially supportive of a prostitute, she is more willing to testify. He also notes "[s]ome progressive police departments now provide emotional and residential support services to prostitutes as well as protection from the pimp."

[54] *Ibid.*, at 62-63.

[55] *Ibid.*, at 63.

[56] *Ibid.*, at 64-65.

[57] *The Street Offences Act*, 1959. 7. 8 Eliz. 2, c.57; *The Sexual Offences Act*, 1956, 4 c. 5 Eliz. 2, c. 69. See generally on this topic M. Freeman, "The Rights of the Child in England" (1981-2). 13 *Columbia Human Rights L. Rev.* 601.

[58] *The Criminal Justice Act*, 1982.

[59] *The Children and Young Persons Act*, 1963, 17 Statutes, 669; *The Children and Young Persons Act*, 1969, 40 Statutes 843.

[60] *Sexual Offences Act*, 1959, 7.8 Eliz.2, c.57.

[61] *Ibid.*, s.6.

[62] *Ibid.*, § 33, 30.

[63] *The Children and Young Persons Act*, 1963, *The Children and Young Persons Act*, 1969.

[64] *Children and Young Persons Act*, 1963, s.1.

[65] *Children and Young Persons Act*, 1969, s.2.

[66] *Ibid.*, § 11-13.

[67] *Ibid.*, § 7, 20, 21.

[68] *Freeman, op. cit.* at 668.

[69] *Ibid.*, at 669.

[70] For details, see J. McEwan, "In Search of Juvenile Justice - The Criminal Justice Act 1982" (1983) *J. of Social Welfare Law* 112.

[71] *Ibid.*, at 116.

[72] *Freeman, op. cit.* at 669.

[73] *Ibid.*, at 629-30.

[74] *The Children and Young Persons Act*, 1969, s.1(2).

[75] *Freeman, op. cit.* at 606.

Chapter 46

Legal Recommendations

1. Introduction

In this section, we discuss our proposals for reform of the *Criminal Code* respecting prostitution involving youths, pornography involving youths, and access to pornography by young people. We also consider what reforms may be necessary to the criminal law in order to protect the young complainant or witness.

We recommend that all of these suggested reforms apply to persons below the age of 18 years.

Recommendation 70

All of the reforms to the criminal law and related statutes dealing with pornography and prostitution involving children and youths should be applicable to persons under 18 years of age.

This division between adult and youth corresponds to that which is found in the text of the *Young Offenders Act*. The scheme of the *Young Offenders Act* is, we note, one of the main reasons why we have departed from the thrust of previous law reform initiatives in this area, which used the age of sixteen as the boundary between adulthood and childhood. We consider that not only the correspondence with this major criminal procedure statute for young persons, but also the merits of the age, amply justify our selection. We are particularly interested in the reality that having 18 as the dividing line means that persons up to 17 are protected, whereas a dividing line of 16 includes only those up to 15 years of age. Evidence at the hearings, and gathered in the studies available to the Committee, place a substantial number of young prostitutes in the age range of 15 to 19. By choosing 18 as a cut-off point, we ensure that the provisions we have crafted will benefit those in half this range at least, instead of almost none of them.

Of course, this observation does point out that the dividing line is a somewhat arbitrary one. Some persons 18 and over may, in fact, be more vulnerable to exploitation than some under 18. We do not claim that the age we have chosen is perfectly appropriate. Yet we are reluctant to suggest that the age be higher, because of the restraints on personal autonomy which are inherent in providing "protection" for the vulnerable by means of the criminal law. At some point, society has to relinquish its protective instincts and trust that persons can look after themselves as adults. There is substantial social consensus that 18 is an acceptable point for this transition to occur.

We considered the possibility of using in the *Code* a flexible age for majority with respect to illegal activities. This approach is a feature of some European legislation.[1] It is, however, out of keeping with the way in which we commonly deal with young persons in Canadian law. Moreover, the flexible age leaves considerable vagueness in the criminal law, about which accused persons could properly complain. Although a fixed age limit may result in overprotection of some young people, we think that this risk is a very acceptable one, given the kinds of harms to which these recommendations are directed.

We have also noted that the Badgley Committee, in setting out offences, draws a line in its offences between those who are under 14, on the one hand, and on the other, those who are over 14 but under 18. The same distinction was featured in some of the bills we have reviewed, and, indeed, is found in some sections of the *Criminal Code*. We do not think that it would be useful to follow this pattern. It seems that the reason for it is to ensure that younger children get a level of protection which is high enough, while still accounting for the greater maturity to be found in those over 14. We are not sure that the results which may ensue from this approach justify its cumbersome nature, and we have declined to adopt it.

A note of caution must be sounded, however, about our choice of 18 as the significant age. While the text of the *Young Offenders Act* stipulates that a young person is one up to the age of eighteen, practice in the early phase of implementing the *Act* has resulted in a lower threshold age in many provinces. Pressure is building in some provinces to delay the date at which eighteen will be the uniform age across Canada for purposes of the *Young Offenders Act*.

We have recommended that persons under 18 be charged with the offences we have recommended be created only on the premise that the procedures of the *Young Offenders Act* will apply to their trial and the disposition of their cases. Should that *Act* not apply in some provinces after the effective date of any of our recommended reforms, then we would deplore the prosecution of a person between the age of eighteen and the upper age limit for the *Young Offenders Act* which is in effect in that province. We do not welcome the idea that a person of 17, or even sixteen, might be tried and incarcerated with adults, and like an adult, simply because of federal-provincial difficulties in the implementation of the *Young Offenders Act*.

Recommendation 71

Trials of persons under 18, accused of any of the offences proposed in our recommendations should be conducted in accordance with the Young

Offenders Act. Accordingly, if the minimum age of 18 as provided in that Act is not fully implemented across Canada by the time these recommendations are in effect, no person under 18, who is not given the protection of the Young Offenders Act, should be charged.

Now we turn to a discussion of the recommendations in the areas of pornography and prostitution.

2. Pornography

This Committee is making a number of recommendations for reform of the *Criminal Code* in order specifically to address the use of young persons in the production of sexually explicit material, and the availability of such material to them. The overall scheme of our recommendations respecting pornography depends on classifying pornographic material into three categories or tiers. The sanctions attached to the material would depend on what category it is in and are described in detail in Part II, Section IV, chapter 20 of the Report. Here we will simply give an overview of the scheme so that the proposals we make about children can be seen in their proper context.

The first tier includes the material which we consider the most harmful. In this tier we have placed material which gives reason to believe that actual physical harm was experienced by the person or persons depicted in it. Such material is in this category because there is no doubt about the harm which has been experienced.

For the purposes of this Chapter, the more important components of tier one are those relating to the use of children in the production of pornographic material and the encouragement of sexual abuse of children. Thus, we subject to strong criminal sanctions both the production, distribution and possession of visual representations of the explicit sexual conduct of persons under 18 years of age, and the production and distribution of material that encourages sexual abuse of children.

We think that it will be apparent from our discussion of the principles underlying our view of children, why we consider it so essential to protect them from being used in the making of pornography. We consider any dissemination of such material to be harmful because it implies that children's sexuality can be exploited by adults. Clearly, to the extent that we can stop the production of such material and its distribution, then the problem of its possession and use by pedophiles becomes less significant.

The reason for prohibiting the production and distribution of material that encourages the sexual abuse of children, is equally clear. The harm to children that results if the message conveyed by such material is absorbed and acted upon by the viewer, is particularly serious.

For adult portrayals, we develop a second category of material which will be proscribed unless it can be shown to have genuine educational or scientific purpose or artistic merit. This tier, called "Sexually Violent and Degrading Pornography", contains material which we believe is extreme in its depictions and, for that reason, is harmful. Nevertheless, in the interest of striking a balance between competing values, we recommend that the material be available to consenting adults if it can be shown to have a scientific or educational purpose or artistic merit.

The third category of material is that which is sexually explicit but which lacks the violence or degradation of the sort we believe characterizes the tier two material. Consequently, we are recommending that this material not be prohibited, but be subject to regulation in terms of where it can be displayed and who can purchase it.

The relevance of tier two and tier three material for the purposes of children is that any material which is permitted under these categories, is subject to display and access restrictions. In all cases, a prominent warning notice must indicate that visual pornographic material is being displayed and that no one under 18 years of age can have access to the premises or part of the premises where the material is displayed. In addition, those under 18 will not be able to buy, rent or see the material in question. These provisions are, of course, designed to ensure that young people do not have access to material which we believe can be harmful to them.

The approach the Committee has adopted is to be as precise as possible in describing the kinds of material to be prohibited or subject to restrictions. In this way, the adjudication of the question of whether particular material falls within a particular tier, does not depend on discerning the community standards of tolerance for that material. For many reasons, we agree with those who have found this approach to be highly problematic. In fact, it is, in part, because we have to avoid the community standards of tolerance approach, that we have developed the system we have just described.

Let us turn now to an examination in more detail of the proposals relating to children.

2.1 Pornography Involving Children

Recommendation 72

Pursuant to recommendation 2 in this Part, the following new section of the Criminal Code should be enacted:

(1) Everyone who:

(a) Uses, or who induces, incites, coerces, or agrees to use a person under 18 years of age to
(i) participate in any explicit sexual conduct for the purpose of producing, by any means, a visual representation of such conduct;
(ii) participate in any explicit sexual conduct in the context of a live show;

(b) induces, incites, or coerces another person to use a person under 18 years of age to
(i) participate in any explicit sexual conduct for the purposes of producing, by any means, a visual representation of such conduct;
(ii) participate in any explicit sexual conduct in the context of a live show;

(c) participates in the production of a visual representation of or a live performance by a person under 18 years of age participating in explicit sexual conduct;

(d) makes, prints, reproduces, publishes or distributes, or has in his possession for the purposes of publication or distribution, a visual representation of a person under 18 years of age participating in explicit sexual conduct

is guilty of an indictable offence and is liable to imprisonment for 10 years.

(2) For the purpose of subsection (1)

(a) a person who at any material time appears to be under 18 years of age shall in the absence of evidence to the contrary, be deemed to be under 18 years of age.

(3) Everyone who sells, rents, offers to sell or rent, receives for sale or rent, exposes to public view, or has in his possession for the purpose of sale or rent a visual representation of a person under 18 years of age participating in explicit sexual conduct, is guilty
(i) of an indictable offence and is liable to imprisonment for 5 years, or
(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for six months or to both.

(4) Every one who knowingly, without lawful justification or excuse, has in his or her possession a visual representation of a person under 18 years of age participating in explicit sexual conduct, is guilty of an offence punishable on summary conviction, and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(5) For the purposes of subsections (1), (3) and (4) above,

(a) "explicit sexual conduct" includes any conduct in which vaginal, oral or anal intercourse, bestiality, masturbation, sexually violent behavior, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted;

(b) "sexually violent behavior" includes
(i) sexual assault, and
(ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, carried out for the apparent purpose of causing sexual gratification or stimulation to the viewer;

(c) "visual representation" includes any representation that can be seen by any means, whether or not it involves the use of any special apparatus.

This section would create a number of offences relating to the participation of a person under 18 in explicit sexual conduct, in two contexts: the production of a visual representation of such conduct, and the live show. The proposed section is intended to specify various offences relating to young persons and to that extent is a departure from the general style of the present section 159 dealing with obscenity.

The offences in our proposed section consist of using, inducing, coercing or agreeing to use a person under 18 to participate in any explicit sexual conduct for the purpose of producing a visual representation of the conduct, or in such conduct in the context of a live show. Also criminalized is the act of inducing, inciting or coercing another person to use a person under 18. The person who participates in the live show or the recorded performance with the person under 18 is subject to prosecution under paragraph (1)(c). A party who makes, prints, reproduces, publishes, distributes, circulates or has in his possession for such purposes a visual representation of a person under 18 engaged in explicit sexual conduct would be included within paragraph 1(d).

The penalty for the maker and the wholesale distributor is set at ten years imprisonment. By reason of section 646(2) of the *Code*, the court may in addition impose a fine, the amount of which would be in its discretion. The term of imprisonment cannot be imposed on the corporation, but paragraph 647(a) of the *Code* allows the court to impose a fine on the corporation in lieu of imprisonment.

The retailer is given somewhat different treatment. If convicted of an indictable offence, the retailer is subject to imprisonment for two years. Subsection 646(2) of the *Code* allows the court to impose a fine, the amount of which would be in its discretion, in lieu of imprisonment. Where the accused is a corporation, paragraph 647(a) of the *Code* provides for a fine, in the discretion of the court, but no period of imprisonment.

However, the Crown may also proceed against the retailer by way of summary conviction. In that event, we have provided that the retailer is liable to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for six months or both. Unfortunately, these specially tailored penalties are available only where the accused is an individual, because paragraph 647(b) of the *Criminal Code* provides that a corporation cannot be fined an amount exceeding $1,000 where the offence is a summary conviction offence. We recognize that we are bound at this time by this general provision applying to corporations convicted of any summary conviction offence in the *Code*. However, in our view, the fine is very low, given the other penalties we are proposing, particularly those directed against individuals.

Recommendation 73

Paragraph 647(b) of the Criminal Code should be amended to provide a higher maximum penalty for a corporation convicted of a summary conviction offence; or the section should provide, as does subsection 722(1), that a higher penalty may be provided with respect to a particular offence.

The rationale behind our creation of smaller penalties for sale of material lies in the position of the ordinary retailer. Although we are aware of the many cynical merchants who sell pornographic material fully knowledgable of what it is, yet we still think it necessary to preserve some flexibility to deal with the merchant who may be, if you will, a less cynical person. We are also concerned about the position of employees of such concerns, who are often those charged, but who may have little leverage to force a change in a situation they consider improper or illegal. In addition to a reduced sentence, we have provided, in our general provisions applicable to all of these suggested reforms, a defence for those who can demonstrate that they used due diligence in inspecting the material offered for sale to see that it did not contain illegal material.

Although the retailer is treated more leniently than the producer or wholesaler of such material, we have nonetheless provided for a minimum fine, to demonstrate that we view the offence as a serious one.

We have included in the draft section a summary conviction offence of possessing a visual representation of a person under 18 participating in explicit sexual conduct. We are aware of the argument that adults should be free to read whatever they wish in private surroundings. We have not dealt lightly with this principle in considering our recommendations. However, we are also mindful that private consumption is very frequently the method of using pornography involving juveniles. We know that youth pornography, like all pornography, has a long life, often circulating or being kept for some time after its original production or sale. Often, there will be no clue at all as to the original producer of the pornography.

We have been told that private production and use of such pornography occurs in circumstances where the only evidence of its production may be that of the child who was videotaped or photographed; for many reasons, that child may be unable or unwilling to testify. The recollection of the child may simply not be detailed enough to establish the requisite connection between the events he or she experienced and the accused's production through home photographic equipment of the representation in question. For these various reasons, the possibility of charging someone with possession of an offending representation is a desirable one. We believe that the availability of such a charge will act as some deterrent to the production and exchange of this material, particularly if convictions under the section are accompanied by publicity and offenders are sentenced to jail.

There is yet another reason for proposing a possession offence. We agree with the Williams Committee that a nation should not be isolationist, protecting only children who are its own nationals from use in pornography. The Report of M. Fernand-Laurent to the United Nations Economic and Social Council described the unfortunate circumstances which may involve children in other countries in pornographic productions. We believe that if creation of the possession offence could reduce, even a little, the international child pornography traffic, it would be well worth while.

We do not propose that persons under 18 years of age who themselves offend against this section should be given any immunity from prosecution. The provisions of the *Young Offenders Act* will provide for a trial procedure and sentencing options particularly designed to deal with the youthful offender. Within such a context, we are satisfied that a youthful offender against this, and the other recommendations we have made on pornography involving children, will be adequately safeguarded.

We have made the penalty for the offence a fine of not less than $500 nor more than $2,000, or six months imprisonment, or both. The minimum penalty is present to ensure that courts will treat the offence with at least some seriousness, but the maximum figure is high enough to deal with a situation where even a "first offender" may have a quantity or a type of material that is regarded as particularly serious. In the case of a repeat offender, of course, the penalty allows for either escalation of the fine or a sentence of imprisonment.

We have recommended provisions which address specifically the procurement of children to engage for reward in sexual acts, and the involvement of children in the production of pornography. These specific recommendations will, in our view, reduce the justification for retaining in the *Criminal Code* the present section 168.

Recommendation 74

Section 168 of the Criminal Code should be repealed.

Section 168 provides that everyone who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence. As we mentioned above, this section has been used to prosecute a mother and her common law husband who took suggestive photographs of her eleven year old daughter.

We do not think that the section will continue to have much utility at all once the recommendations we have made have been implemented. We suspect that its main utility up to now, as in the case we mentioned, lay in the fact of its general wording; because there were no specific offences, section 168 might be pressed into service to cover particular instances of sexual exploitation.

However, the section presents enormous hazards. Its language is broad enough to cover, at least, the situation of two persons living common law, with the children of one or another, while awaiting the chance for one to secure a divorce from a former spouse. Such a couple would be participating in adultery in the home of a child. The use of the terms "sexual immorality", "other form of vice" endangering the morals, and rendering the home an unfit place, all contribute to the vagueness and elasticity of the section. That the administration of this section was seen even by its framers to present some difficulties is seen by the inclusion of a requirement that the Attorney General consent to any prosecution not brought by a recognized child welfare authority.

2.2 The Sexual Abuse of Children— Advocating or Encouraging

Recommendation 75

A new section of the Criminal Code should be enacted to deal with production, dissemination and possession of material advocating, encouraging or presenting as normal the sexual abuse of children in the following form:

(1) Everyone who makes, prints, reproduces, publishes, or distributes, or has in his possession for the purposes of publication or distribution material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for 10 years.

(2) It shall not be a defence to a charge under subsection (1) that the accused was ignorant of the character of the material, matter, thing or production.

(3) Everyone who sells, rents, offers to sell or rent, receives for sale or rent, exposes to public view, or has in his possession for purpose of sale or rent material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty
(i) of an indictable offence and liable to imprisonment for 5 years, or
(ii) of an offence punishable on summary conviction and liable to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for six months or to both.

(4) Everyone who knowingly, without lawful justification or excuse, has in his or her possession material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of a summary conviction offence and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(5) For purposes of this section "material" includes any written, visual or recorded matter.

(6) For purposes of this section "sexual abuse" means any sexual activity or conduct directed against a person under 18 years of age which is prohibited by the Criminal Code.

In this provision, we have followed the same pattern as was established with the preceding section on pornography involving children. Everyone who makes, prints, reproduces, publishes, distributes or has in his possession for these purposes the offending material is guilty of an indictable offence punishable with 10 years imprisonment. An offence subject to lesser penalties is created for everyone who sells, offers to sell, receives for sale, advertises, exposes to public view, or has in his possession for these purposes the material. Simple possession, in turn, is made an offence punishable on summary conviction.

The material which will attract the sanction is that which advocates, encourages, condones or presents as normal the sexual abuse of children. We have not limited the sanction to material which consists of visual representations. Material which is entirely written will attract the sanction. We have seen, during the course of our research, a number of publications, entirely in prose, which focus on various aspects of sex with children. Many involve incestuous relationships. Often, the descriptions of sexual activities with young people will be explicit, if not lurid, in detail. The general tenor of such publications is that sexual relations with young persons is acceptable, or desirable, and indeed that young people themselves welcome such activities, whether incestuous or not. We did not want to create a criminal law scheme which would omit this type of material from its reach.

It has been drawn to our attention that there may well be a cultural dimension to material discussing or promoting sexual activities with young people. Spokespersons for the gay community in particular have cautioned us against measures which would make legitimate communication and exploration of sexual identity in that community a perilous activity. We are appreciative of the thoughtful and informed advocacy of this point of view which we received during our hearings.

We believe that we can respond to this interest in only a limited fashion, because of the other concerns which we must take into account in formulating our recommendations. Subsection (6) of this proposed section describes "sexual abuse" as any sexual activity or conduct directed against a person under 18 years of age which is prohibited by the *Criminal Code*. In discussing our recommendations on procuring, we have reviewed the offences which deal with sexual activity with young persons, and have noted that the upper age limit for prohibited acts is 21 with respect to buggery and gross indecency. We have recommended lowering that limit to "under 18" in order to rationalize these provisions with the other sections of the *Code* dealing with sexual offences involving young people. We have also recommended extending the protection of the *Code* which now is available only to young females to young males.

We think that this review of sections 140 to 157 of the *Code* should put treatment of sexual activity with young males on the same footing as that with young females; adults involved with young people should also be placed in the same position whether their activities are with young people of the same sex as they are or of a different sex. If that rationalization of the criminal law relating to sexual activity with young persons occurs, then we think that it is fair to incorporate the reformed sections into the definition of "sexual abuse" used in this proposed section.

We are not prepared to go further. We cannot, for whatever cultural reasons, accept that advocacy of sexual relations between adults and young people under 18 is a beneficial or even neutral act. The same observation applies to material encouraging, condoning, or normalizing such acts. We do not countenance such messages where the relations being advocated are heterosexual ones between adults and children. There has not been made out any special reason why it should be tolerated when the partners are of the same sex.

2.3 Live Shows

Recommendation 76

> **Section 163 of the Criminal Code should be repealed and replaced by a new section which would include provisions dealing specifically with the presentation of a live show advocating, encouraging, condoning, or presenting as normal the sexual abuse of children, in the following form:**
>
> **(1) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for 10 years.**

This provision with respect to live shows is a supplement to the subsections on live shows which are included in the section dealing with using children in pornography. The intent of the provision is to penalize advocacy, encouragement, condonation, or normalizing of sexual abuse of children when it occurs in a live show. The definitions applicable to this provision are the same as those which we use in conjunction with the subsections on the use of children in pornography.

2.4 Use of the Mails

Recommendation 77

> **Section 164 of the Criminal Code should be repealed and a section enacted which includes provisions dealing explicitly with use of the mails to transmit material involving children or advocating the sexual abuse of children, along the following lines:**
>
> **(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any material which:**
>
> **(a) depicts a person or persons under the age of 18 years engaging in explicit sexual conduct,**
>
> **(b) advocates, encourages, condones, or presents as normal the sexual abuse of children,**
>
> **is guilty of an indictable offence and liable to imprisonment for 10 years.**

This section is intended to replace the present section 164 of the *Criminal Code*, which makes it an offence to use the mails for the purpose of transmitting or delivering anything that is obscene, indecent, immoral or scurrilous. In our proposed section, we have once again tried to be specific, and to directly refer to material involving children.

Distribution by mail of material which depicts a person or persons under the age of 18 engaged in explicit sexual conduct or which advocates, encourages, condones or presents as normal the sexual abuse of children is an indictable offence attracting a penalty of 10 years imprisonment. In addition to this penalty, the provision in the general section of our recommended provisions permitting forfeiture of such material applies to this section.

2.5 Pornography, Sale to and Access by Children

Recommendation 78

A new section should be included in the Criminal Code, to control display of visual pornographic material to persons under 18 years of age, in the following form:

(1) Everyone who

(a) sells, rents or offers to sell or rent visual pornographic material to anyone under 18 years of age; or

(b) displays for sale or rent visual pornographic material in such a manner that it is accessible to and can be seen or examined by anyone under 18 years of age; or

(c) being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein to anyone under 18 years of age any visual pornographic material

is guilty of a summary conviction offence and is liable to a fine not to exceed $1000 or to imprisonment for 6 months or to both.

(2) No one shall be convicted of an offence under subsection (1) who can demonstrate that

(a) he used due care and diligence to ensure that there was no such visual pornographic material in the materials which he sold or rented, offered for sale or rent, displayed for sale or rent, or presented, gave or allowed to be presented or given; or

(b) the visual pornographic material has a genuine educational or scientific purpose and was sold or rented, offered for sale or rent, or displayed for sale or rent, presented, given, or allowed to be presented or given, for that purpose; or

(c) according to the classification or rating established for film or videotape material in the province or territory in which it is sold, rented, offered for sale or rent, displayed for sale or rent, presented, given or allowed to be presented or given, the film or videotape has been classified or rated as acceptable for viewing by those under the age of 18 years.

(3) For purposes of this section, "visual pornographic material" includes any matter or thing or live performances in which is depicted or described vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any material prohibited by [offences involving portrayals of children and sexually violent or degrading material].

Recommendation 79

Subsections 159(2)(b), (c) and (d) of the Code should be repealed and replaced by a provision specifically directed at selling or displaying sex aids to a person under 18 years of age, in the following form:

(1) Everyone who

(a) sells or offers to sell a sex aid to anyone under 18 years;

(b) displays for sale sex aids in such a manner that they are accessible to and can be seen or examined by anyone under 18 years of age,

is guilty of a summary conviction offence and is liable to a fine not to exceed $1000 or to imprisonment for 6 months or to both.

(2) For the purposes of subsection (1) "sex aid" includes any device, apparatus or object designed solely to stimulate sexually the user of it.

In the two draft sections set out above, we address the problem of access by children to pornographic material. The first section deals with the sale and availability to children of "visual pornographic material". This matter is broadly defined as including any material whether in the form of books, magazines, films or video-cassettes in which vaginal, oral or anal intercourse, bestiality, masturbation, sexually violent behaviour, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals is depicted.

We have included in our recommendations a proposed section of the *Code* to prohibit display of visual pornographic materials generally. The thrust of that section is to prohibit the display of those materials so that they are visible to members of the public in a place to which the public has access by right or by express or implied invitation. The defence to the charge is to demonstrate that the material was displayed in a part of the premises to which access is possible only by means of passing a prominent warning notice advising of the display therein of visual pornographic material.

The section described above makes it an offence to sell or offer to sell visual pornographic material to anyone under 18 years of age. We do not recommend creation of a similar offence with respect to persons generally.

The section described above also creates an offence of displaying, for sale or rent, visual pornographic material in such a manner that it is accessible to and can be seen or examined by anyone under 18 years of age.

Because of the breadth of the definition of visual pornographic material, we have considered whether the section should provide any defences like those provided for the second tier of material, namely defences resting on artistic merit or on the scientific or educational purpose of the work. Alternatively, we have considered the possibility of lowering to 16 the age below which the young person cannot see the material.

We are not in favour of lowering the age in this one case. Upon close examination, the problem prompting consideration of these two options is the problem of the student of sixteen or seventeen, possibly at a CEGEP or university, whose curriculum may involve reading material which technically is within this definition. Or, consider too the case of the young married person who may be able to do some of the things described in the definition without fear of sanction but may not see representations of them. In either case, we think that the appropriate response to the dilemma is to provide exceptions, but not to lower the age. Even with the age at 18, it is likely that persons quite a bit younger than 18 will pass unchallenged into some premises. Were we to lower the limit, we think that we would, in reality, be lowering the effective age at which persons permit young people access to this material to a point quite a bit below 16. Accordingly, we have chosen to provide the artistic merit, and educational or scientific purposes, defences with regard to this offence. We have also provided a defence based on the due diligence of the proprietor in inspecting the material offered for sale or rent.

The provision with respect to sex aids is intended to replace, in part, the current offences in subsections 159(2)(b), (c) and (d). Paragraph (b) creates the offence of publicly exhibiting a disgusting object or show, and paragraphs (c) and (d) create offences relating to means, instructions, medicine, drugs or articles intended or represented as a method of causing abortion or miscarriage or of restoring sexual virility or curing venereal diseases or diseases of the generative organs.

We have framed a general definition of "sex aid" which we think will encompass the "disgusting object" now dealt with in paragraph 159(2)(b) and the materials claiming to restore virility described in paragraph 159(2)(d). The disgusting show covered in paragraph 159(2)(b) is, we think, adequately dealt with in our provisions respecting live shows. Medicines or agents aimed at curing diseases or procuring miscarriage are, in our opinion, more appropriately regulated by way of food and drug legislation, aimed at safety of product, accuracy of claims, and the social and medical desirability of the substance.

Our focus, in the recommendation concerning sex aids, is on the availability of such devices and substances to persons under 18 years of age. With some such mechanisms or substances, the concern of the criminal law is with actual safety, particularly when the youth who may get such a device or substance is quite young. In other cases, the concern is similar to that of the provision about accessibility of visual pornographic material: we desire to put out of the way of even a moderately curious young person, the chance of being unwittingly and unwillingly alarmed or upset by such materials. As it is certainly within the power of merchants to arrange their premises and displays so as to effect this object, we consider that it is quite reasonable to penalize failure or refusal to do so.

We propose to include in the foregoing sections the following definitions, which will be applicable to all of the provisions:

Recommendation 80

The following definitions should apply to the sections of the Code dealing with pornographic offences:

"sexually violent behaviour" includes

(i) sexual assault,

> **(ii) physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.**

> **"visual pornographic material" includes any matter or thing or live performances in which is depicted or described vaginal, oral, or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.**

2.6 Evidence

With respect to a number of the reform proposals we have made in the foregoing sections, it is apparent that law enforcement authorities will be relying on the evidence of young persons under 18 in order to proceed successfully with a prosecution. In some cases, only the evidence of the child or young person will be available.

We are not in favour of hedging the child's testimony with any requirement that it be corroborated, or that the court advise a jury that it is unwise to convict on the basis of such evidence alone. The Report of the Committee on Sexual Offences Against Children and Youths concluded, on the basis of its research, that young persons, even those young in years, can be reliable witnesses.[2] Persons who gave briefs at our hearings were in agreement that a child's testimony could be accepted without qualifications which would limit its probative value: we took the opportunity ourselves of probing this issue with those whose views we thought might assist us.

Recommendation 81

> **The Evidence Acts of Canada, the provinces and the territories should be amended to provide that every child is competent to testify in court and the child's evidence is admissible; the weight of the evidence should be determined by the trier of fact.**

Recommendation 82

> **There should be no statutory requirement for corroboration of "unsworn" child's evidence; this would entail repeal of section 586 of the Criminal Code, section 16(2) of the Canada Evidence Act and section 61(2) of the Young Offenders Act, and corresponding sections of provincial Evidence Acts.**

We think that it is in keeping with our approach to the dignity of the young person that no categorical restriction be placed on the reception or weight of a young person's evidence. It should be treated by a court according to the same principles as would be applied to the testimony of an adult.

We have included below some recommendations concerning protection from publicity which we think should be extended to the youthful witness and complainant. These protections should be available whether the accused is an adult being tried pursuant to the *Criminal Code* or a young person whose trial is governed by the *Young Offenders Act*. At present, the protections extended to the youthful complainant or witness are not as complete in a trial of an adult under the *Code* as are those available in a *Young Offenders Act* proceeding.

If the *Code* were amended to provide a more sheltered environment for the young complainant or witness, we do not think that further protections would be warranted. In particular, we would avoid any amendment or relaxation of the hearsay rules in order to permit a child's account of an act of sexual abuse to be presented to the court through the testimony of an adult to whom the child may have told the story on a previous occasion. We are not persuaded that such an adult, who will probably be quite close to the child in most cases, can in fact serve merely as a neutral conduit for the child's evidence. Neutrality in the initial reception of the story and in its subsequent retelling not being reliably predictable, we do not believe that a departure from the normal hearsay rules is warranted.

Recommendation 83

> **No alteration be made to the Evidence Acts of Canada or the provinces and territories to permit reception by a court of hearsay evidence of a child's account of the commission against him or her of a sexual offence.**

This Committee is recommending that persons who involve young people in prostitution, or in the production of pornography, be subject to penalties. The creation of these new offences raises questions concerning the publicity to be given to the trials of accused persons, to convictions, and to the identity of youthful complainants, witnesses and accused.

There are at present provisions in both the *Criminal Code* and the *Young Offenders Act* which deal with these questions.

Subsection 442(1) of the *Criminal Code* states the general rule that proceedings against an adult accused shall be in open court. The subsection also provides, however, that where the presiding judge, magistrate or justice is of the opinion that it is in the interest of public morals, the maintenance of order, or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he or she may so order.

In deciding whether to exclude the public under this section, a court is likely to bear in mind the principle enunciated by the Supreme Court of Canada that, as a general rule, the sensibilities of the individuals involved are not a basis for exclusion of the public from judicial proceedings.[3] As observed by Mr. Justice Brooke of the Ontario Court of Appeal:

> It is hard to imagine any trial, civil or criminal, where men or women, boys or girls, and particularly the latter have to testify as to sexual behaviour that the witness will not be embarrassed. But this alone is not reason to suppose that truth is more difficult or unlikely or that the witness will be so frightened as to be unable to testify.[4]

In one case arising under the section, the Crown's fear that teenaged girls who were being called as witnesses would be embarrassed to testify was held to be insufficient basis for an order excluding the public throughout the trial.[5] In another, it was ruled improper for a trial judge to have excluded from a trial on charges of keeping a common bawdy house a local reporter who refused to undertake to keep the names of found-ins out of the newspaper.[6] An order has also been refused in the case of the trial of a number of persons on gross indecency charges.[7]

This provision of the *Criminal Code* applies to the trials of accused persons who are eighteen years of age and over. Trials of persons under the age of eighteen years are governed by the *Young Offenders Act*. Section 39 of that *Act* contains a number of provisions dealing with exclusion of persons from the courtroom during the trial of a young person. Paragraph 39(1)(b) provides that where a court or justice is of the opinion that it would be in the interest of public morals, the maintenance of order, or the proper administration of justice to exclude any or all members of the public from the courtroom, any person may be excluded from the courtroom if the court or justice deems that person's presence to be unnecessary to the conduct of the proceedings.

It will be noted that this standard for excluding the public from a trial under the *Young Offenders Act* is quite similar to that in the *Criminal Code*, except that the *Young Offenders Act* imposes the further requirement that the presence of a person to be excluded must be "unnecessary" to the proceedings.

The *Young Offenders Act* includes, however, certain other provisions for the exclusion of persons from trials which are not found in the *Criminal Code*. Where the court or justice is of the opinion that any evidence or information would be seriously injurious or seriously prejudicial to the young person who is being dealt with in the proceedings, who is a witness in the proceedings, or who is aggrieved by the offence charged in the proceedings, then paragraph 39(1)(a) allows the court to exclude any person from all or part of the proceedings if it deems the person's presence to be unnecessary to the conduct of the proceedings.

The provisions of subsection 39(1)(a) were considered by Mr. Justice R.E. Holland of the Ontario High Court in *Southam Inc.* v. *Her Majesty the Queen*[8]. He held that it was valid under the *Canadian Charter of Rights and Freedoms*, as a reasonable limit on freedom of expression, demonstrably justifiable in a free and democratic society.

Subsection 39(1)(a) presumably allows the court to exclude a young person from the court while evidence is given which would harm him or her, or presumably to exclude another person from court while the young person is testifying. However, the *Young Offenders Act* provides that the court may not exclude the accused, his or her counsel, or parent from the trial pursuant to any power to exclude granted in subsection 39(2).

Differences between the *Criminal Code* and the *Young Offenders Act* may also be noted with respect to the court's power to forbid publication of details from the trial.

The *Criminal Code* provides in sections 246.4 and 442(3) that in cases of incest, gross indecency, sexual assault, sexual assault with a weapon and aggravated sexual assault, when an application is made by the complainant or the prosecutor, the presiding judge shall make an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any newspaper or broadcast. Where there is no such application from the complainant or the prosecutor, the judge may still make this order, but is not bound to do so. Subsection 442(3.1) obliges the presiding judge to draw to the complainant's attention at the first reasonable opportunity the right to make an application for an order of non-publication.

The validity of those sections was considered recently by the Ontario Court of Appeal, in the case of *Canadian Newspapers Company Limited* v. *A-G Canada.*[9] Subsection 422(3.1) was upheld. However it was held that the mandatory element in subsection 442(3) was contrary to the *Charter of Rights*. The Court accepted that the social value to be protected, namely the bringing to justice of those who commit these kinds of sexual offences, is of superordinate importance and justifies a prohibition against publication of the victim's identity or of anything that could disclose it.[10] However, it ruled that making the order automatically, on the application of the complainant or the Crown, went beyond what could be considered a "reasonable limit" on the right to freedom of expression. This decision has the effect of removing this mandatory element, so that now, it is up to the court's discretion in every case whether an order of non-publication should issue, even if the victim applies for it.

The Chief Justice of Ontario, in coming to this decision, observed:

> The discretion given to the trial judge under s. 442(3) to make a prohibition order is a sufficient safeguard for the protection of the identity of the complainant. In most cases it will no doubt be made as a matter of course. However, in an exceptional case where it is not merited the presiding judge should have an opportunity to refuse to make it.[11]

As comforting as these words may be, one wonders if the courts will indeed be ready to grant non-publication orders all that readily. In *R.* v. *McArthur*[12] Mr. Justice Dupont granted an order refusing the publication of names of witnesses who were prison inmates and feared physical harm if other prisoners learned they testified. In the course of his reasons for doing so, he observed

> This case must be distinguished from those where the court is asked to restrain publication of names where not to do so would create embarrassment, humiliation or even financial loss. Under most of such circumstances, the rights [sic] of complete public disclosure is paramount.[13]

In cases where the grant of an exclusion order formerly was automatic, more judges may well now refuse them on the ground that potential embarrassment to the victim does not outweigh the public's interest in knowing her name. Unfortunately, it can be predicted that a few well-publicized decisions to this effect will have a negative effect on the willingness to report sexual assault.

Subsection 442(3) in the *Criminal Code* would protect a complainant who is an adult or a young person. There is, however, no provision to protect a witness from disclosure of his or her identity. Nor is there a provision to permit withholding the identity of an accused, and the case law shows an unwillingness to use the provisions of subsection 442(1) to achieve this purpose indirectly.

By contrast, subsection 38(1) of the *Young Offenders Act* prohibits the publication of a report of an offence allegedly committed by a young person or of any proceeding in connection with such an offence, in which the name of the accused young person, a child or young person aggrieved by the offence or a child or young person who appeared as a witness in connection with the offence is disclosed. It is also forbidden to publish any information which would serve to identify such child or young person. The protection against publication which is provided by subsection 38(1) of the *Young Offenders Act* is automatic; it does not depend on whether an application is made to the presiding judge. The validity of this provision was upheld in a decision of Mr. Justice Holland of the Ontario High Court, albeit before the decision of the Ontario Court of Appeal invalidating the mandatory element in subsection 442(3).

In our view, it is necessary to rationalize these provisions of the *Criminal Code* and *Young Offenders Act* if they are to be applied to the new offences we recommend. We note the following significant discrepancies between the protections afforded by the *Criminal Code* and those in the *Young Offenders Act*. Firstly, with respect to excluding persons from judicial proceedings, we note that the *Young Offenders Act* provides for an exclusion in order to protect a child or young person who is the complainant or witness from evidence or information which would be "seriously injurious" or "seriously prejudicial" to the young person. Similarly, where evidence is offered by a child or youth that may be seriously injurious or seriously prejudicial to a youthful accused, complainant or witness, the *Young Offenders Act* would allow exclusion of third parties during the taking of such evidence. The youthful witness or complainant in a trial involving an adult accused is not given similar protection, unless one can regard the possibility of an order under subsection 442(1) as equivalent.

It seems to this Committee that the position of the youthful witness or complainant should not depend on whether an accused is an adult or a young person. We recommend that provisions like those of subsection 39 of the *Young Offenders Act*, permitting exclusion of young complainants or witnesses, or of third parties, when the evidence will be seriously prejudicial or seriously injurious to the young witness or complainant should be inserted into the *Criminal Code*. We expect that judicial sensitivity to the dangers of having "secret" trials may cause courts to be sparing in their resort to such sections, but believe that the provisions should be there in the event that they are really needed.

Recommendation 84

> **Subsection 442(1) of the Criminal Code should be amended to allow the court to exclude any person from the courtroom where any evidence or information presented to the court would be seriously injurious or seriously prejudicial to the complainant or witness who is under 18.**

Turning now to the question of reports of trials, we note that while the identity of the youthful accused may not be published, that of the adult accused may be. We do not recommend changing that scheme. We have considered the position of the adult from two perspectives, that of the adult charged with an offence, but not convicted and that of the adult who has been convicted. In our view, publication of the names of an adult convicted of an offence involving use of young people in prostitution or pornography would serve an extremely valuable deterrent function. In fact, we would urge that as much publicity as possible be given to conviction and sentencing of these offenders, so that others may learn that such activites will not go unpunished. We would however, make an exception to this general principle in the case of those convicted of incest, where adverse consequences to the victim will ensue from publication of the perpetrator's name.

Recommendation 85

> **As much publicity as possible should be given to the name of an accused who is convicted of an offence involving the child pornography or child prostitution offences we propose, and the sexual offences in the Code, with the exception of the name of a person convicted of incest.**

In the case of adults accused and convicted of offences involving children, we see no compelling reason to extend to them the anonymity which now is given the youthful accused. There should be no ban on the publication of the names of such accused; however, mindful of the impact of publicity, we do not urge that accused persons' identities be publicized in the same way as we have urged that the names of the convicted be published.

With respect to the position of complainants and witnesses, we note that the protection afforded by the *Young Offenders Act* against identification of the youthful complainant or witness is better than that offered by the *Criminal Code*. The recent invalidation of the mandatory publication ban simply makes the position of the youthful victim of adult crime all the worse. Once again, we find it hard to justify providing better protection to a youthful witness or complainant where the accused is youthful than where the accused is an adult. The harm which can be done by publication of the identity is the same in both types of case. Accordingly, we would recommend that the youthful complainant, and youthful witnesses, be given, in the *Criminal Code*, the same automatic protection against publication of identity as provided now in subsection 38(1) of the *Young Offenders Act* to youthful complainants and witnesses.

Recommendation 86

Subsection 442(3) of the Criminal Code should be amended to provide for the complainant and witness under 18 years of age the same mandatory protection from publication of name or identifying information as is now extended to youthful witnesses and complainants in trials of young offenders by section 38 of the Young Offenders Act.

The question of course arises whether a mandatory provision protecting youthful complainants and witness in the *Criminal Code* would survive a challenge brought under the *Charter of Rights*. On the one hand, it is the decision of the Ontario Court of Appeal in *Canadian Newspapers* stating that the mandatory ban in subsection 442(3) is improper, but on the other hand, a decision upholding a similar mandatory ban in the *Young Offenders Act* in favour of protecting youthful complainants and witnesses.

One hopes that the philosophy of protecting youth and encouraging them to report sexual assault would prevail, to justify inclusion of a mandatory ban for youthful complainants and witnesses in subsection 442(3). If not, then there is a real prospect that a youthful complainant or witness in an adult proceeding will be denied "equality before the law" contrary to section 15 of the *Charter of Rights*. This is because the youth who is assaulted by an adult is, in the matter of protection of identity, treated less favourably than a youth assaulted by another youth. Given that aggression against children by adults is, arguably the more serious of the two situations, the discrepancy in protection is hard to justify.

It will be noted that section 442 is applicable to the offences described in section 246.4 of the *Code*. As a housekeeping matter, it will be necessary to include in section 442 reference to the offences which we have recommended be created, and we so recommend.

Recommendation 87

Subsection 442(3) of the Criminal Code should be amended so as to make it clear that section 442(3) applies to the offences recommended by this committee.

2.7 Defences

We have provided, in our draft legislation, for a due diligence defence in certain circumstances. With respect to the offence of sale of visual pornographic material to children, for example, we have provided that an accused may defend on the basis that he used due care and diligence to ensure that there was no such visual pornographic material in the materials sold or rented.

We propose that the due diligence defence be available in two other sections of our criminal law recommendations concerning child pornography. These two offences are the sale of child pornography and the sale of material advocating the sexual abuse of children.

Recommendation 88

> **A person accused of the offence of selling pornography containing sexually explicit portrayals of children, or of selling pornography advocating the sexual abuse of children, should be entitled to defend the charge on the basis that he had used due diligence to inspect the materials.**

The draft section which we propose to make applicable to these offences is:

> Nobody shall be convicted of the offences in sections—who can demonstrate that he used due diligence to ensure that there were no representations in the materials, matters or things which he sold, rented, offered for sale or rent, exposed to public view, or had in his possession for purposes of sale or rent, which offended the section.

Particularly at the retail level, there may well be situations where large volumes of material come from a wholesaler. We heard evidence at the public hearings that sometimes the retailer will not even inspect the material before it is put on the shelves. Often, the material will be shelved by young employees of a retail concern who would not, in any event, have the authority to prohibit display of improper material even if they detected it.

By making available a due diligence defence, we hope to encourage persons at the mangement level of retail enterprises to take an interest in what goes on the shelves, and to inspect the material for compliance with the law.

We have given considerable thought to the question of penalties for the proposed offences. The rationale for one particular choice of penalty is discussed above with the various recommendations.

2.8 Penalties and General Sections

In addition to the specific penalties for offences which are contained in the proposed sections, we note the impact of certain general sections of the *Criminal Code*.

Subsection 646(1) of the *Code* provides that an accused convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any other punishment that is authorized. Where the accused is convicted of an indictable offence punishable with imprisonment for more than five years, subsection 646(2) of the *Code* allows imposition of a fine in addition to any other punishment that is imposed. The size of the fine in either case is in the discretion of the Court.

Some of the offences we recommend are punishable upon summary conviction, rather than as indictable offences. Some of our proposals would permit the Crown to proceed either by indictment or by summary conviction.

Subsection 722(1) of the *Criminal Code* provides that, except where otherwise expressly provided by law, every one convicted of an offence at summary conviction is liable to a fine of not more than $500 or to imprisonment for six months or both.

As we have discussed above, we have departed from this minimum with respect to all the summary conviction offences which we recommend, because it is too low. By reason of paragraph 647(b) of the *Code*, a corporation convicted of a summary conviction offence may be fined, in lieu of imprisonment, an amount not to exceed $1,000. We view this provision as much too low. This statutory maximum fine provision would apply, for example, in the case of a corporation convicted, in summary proceedings, of selling a visual representation of someone under 18 participating in explicit sexual conduct. We do not think that a maximum fine of $1,000 adequately reflects society's opinion of the seriousness of this offence. It is true, of course, that in this instance, the Crown would have the option of proceeding by way of indictment, and thus securing a higher fine. However, this is not the case with some of the other summary conviction offences, like those involving display of visual pornographic material to children.

Paragraph 647(b) does not recognize the option that a higher fine may be attached to a particular crime, as does subsection 772(1). Accordingly, we cannot craft a penalty which we think appropriate for the corporate offender, in the case of a summary conviction offence. Such a change must come, as offences must come, as part of an across the board change, or not at all.

That is why we have recommended above that paragraph 647(b) be amended to raise the maximum fines for corporations convicted of a summary conviction offence, or to provide that the penalty can be individually suited to each offence enacted, as is the case with section 722(1).

There are, however, two other recommendations which will have a bearing on the corporate offender. The first of these is for forfeiture of the offending materials and copies of it in the event of a conviction under our proposed sections.

Recommendation 89

The Criminal Code should be amended to add a provision that:

> **In any proceedings in which a person is convicted of producing, distributing or selling pornographic material the court shall order the offending material or matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.**

This provision is not a free-standing section which would allow forfeiture proceedings to be brought whether or not a criminal charge had been laid against an individual or corporate accused, like the present section 160. Rather, it is an integral part of the penalty for the offence. It is some advance over the provisions which permit seizure only of the material before the court in the trial, because copies of that material may also be seized.

We believe that it is also important to have a section which addresses the criminal liability of the managers or directors of a company which offends the recommended provisions.

There are good reasons for wanting to go behind the corporate façade. Either in the notable case of a Bob Guccione or Hugh Hefner, or in the less grand case of a fly-by-night operator, the real advocate and purveyor of certain material will be an individual, but he will act through a corporation. The corporate structure may be such that he never can be said to be personally involved in the act of production, distribution or sale. In such a case, a section aimed at the director would help bring to account the person responsible for the behaviour.

Recommendation 90

> **A section should be added to the Criminal Code to provide for criminal liability of officers and directors, along these lines:**
>
> **Where an offence under this act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.**

3. Prostitution

The Committee recommends that the sections of the *Criminal Code* dealing with soliciting, procuring, and bawdy houses be completely restructured, so that they address the contemporary reality of prostitution. The sections we have drafted to replace the present *Code* provisions deal with street nuisance, procuring, and prostitution establishments. The proposed provisions dealing with procuring and prostitution establishments contain special parts to address the situation of young persons. These parts are set out and discussed below. In addition, we create a new offence of engaging in, or attempting or offering to engage in sexual activity for money or other consideration with a person under 18. It, too, is set out and discussed in this part.

3.1 Procuring

Recommendation 91

> **Sections 166 and section 195(1)(a) to (i) of the Criminal Code should be repealed and replaced with a new prohibition on procuring, which would deal specifically with the procuring of those under 18. That section is:**

(1) Everyone who

(a) by force, by threat of force or by other coercive or threatening behaviour induces a person of 18 years or older to engage in prostitution with another person or generally, or

(b) by force, by threat of force or by other coercive or threatening behaviour compels a person of 18 years or older to continue engaging in prostitution with another person or generally

is guilty of an indictable offence and liable to imprisonment for 14 years.

(2) Everyone who

(a) persuades, coerces or deceives a person under 18 years of age in order to induce that person to engage in sexual activity for money, or for any other consideration or reward, or in illicit sexual conduct with another person or generally, or

(b) encourages, coerces or deceives a person under 18 years of age in order to induce that person to continue to engage in sexual activity for money, or for any other consideration or reward, or in illicit sexual conduct with another person or generally,

is guilty of an indictable offence and liable to imprisonment for 14 years.

(3) For the purposes of subsection (2), "illicit sexual conduct" means any sexual behaviour or act which is prohibited by the Criminal Code, whether or not such prohibition is based upon the age of the parties to the act or of any one of them.

These provisions about procuring are intended to replace the present procuring provisions of the *Criminal Code* which are found in paragraphs 195(1)(a) to (i). The procuring provisions relating to young persons which we recommend are found at subsections (2) and (3), outlined in heavy type. These provisions represent an innovation of sorts, because the *Code* does not now treat procuring of children any differently from procuring of an adult, except for the creation, in section 166 of the *Code*, of a prohibition against a parent or guardian procuring the defilement of a female child. Our provisions in (2) and (3) above would replace the present section 166.

Some important differences may be noted between subsection (1) of our procuring section, dealing with those 18 years and over, and subsection (2), dealing with those under 18. Firstly, the burden of the procuring offence vis-a-vis the adult victim is in the would-be procurer's use of force or threats. We have proceeded on the assumption that an acceptable degree of freedom of choice may be present in the decision of an adult to engage in prostitution, assuming that the element of coercion may be controlled. We do not make the same assumption about the decisions of those under 18. Accordingly, persuading or deceiving a person under 18 to engage in sexual activity is made a criminal offence, as is coercion of such a person.

It may well be argued that the distinction between the two cases is a somewhat artificial one. Someone over 18 may be persuaded or deceived into prostitution; some of those under 18 may be quite capable of realistically assessing efforts to "persuade" them to a particular course of conduct and of resisting such blandishments. We recognize that the distinction based on age in this way is not a perfect one. However, we believe that overall the greater harm may arise from underprotecting the younger person than from underprotecting the older one.

Secondly, the offence in regard to the older person consists of coercing him or her to engage, or continue to engage in prostitution. The definition of "prostitution" for purposes of this provision is "the provision of sexual services by one person to another in return for money". By contrast, the offence with regard to the younger person is to induce him or her to engage, or continue to engage, in sexual activity for money, or for other consideration or reward, or to engage or continue to engage in illicit sexual conduct. These types of activities are more extensive than "prostitution". The extension in the language is intended to cover the case where a young person receives no cash, but rather room and board, or presents, or other payment in kind in return for sexual activity. Sometimes, the young person may in fact receive nothing at all for his or her activities. We would prohibit procuring a child to engage in sex for no reward, just as we prohibit procuring of the child to engage in sex for reward. The prohibition against procuring the child to engage in "illicit sexual conduct" would, accordingly, cover this type of case.

The category of situations which would come within the definition of "illicit sexual conduct" must be carefully examined. Given the present wording of the *Criminal Code*, we believe that there are a number of problems arising from this formulation. For example, the "illicit sexual conduct" definition would encompass buggery and bestiality, as well as gross indecency. In order to escape prosecution for these offences, the acts have to be committed in private by two persons each of whom is 21 years of age or more. Unless this age limit is lowered to 18 years of age or more, the combination of our definition of illicit sexual conduct and these provisions will cause some awkward discrepancies. For example, a person could be charged with procuring a person to commit buggery only if the person were under 18, but it would still be illegal to commit buggery with someone between 18 and 21. Rather than extend our procuring recommendations to protect persons up to 21, we recommend dropping the upper age limit for the buggery and gross indecency offences to 18.

Recommendation 92

The age specified in section 157 of the Criminal Code should be lowered to 18 from 21, so that the prohibition against buggery in section 156 of the Code and against an act of gross indecency in section 156 will not apply to acts committed in private between persons who are 18 or over.

Elsewhere, we have recommended that section 157 be repealed altogether. It may be thought that this leaves a gap in the protection afforded to young persons against certain kinds of assault. However, we consider that it is desirable for the sexual offences in sections 140 to 157 to be overhauled and brought up to date, and are satisfied that the protection afforded to young people by section 157 could be extended in a re-worked section which would not feature such vague and broad language as "gross indecency". Such an overhaul could, we recognize, also involve repeal of section 157 as we now know it.

A number of offences in the *Code* involve sexual intercourse with a female under a certain age, or in certain circumstances.[14] The prohibition does not extend to sexual intercourse with a male. Because we intend to prohibit procuring of young males for sexual activity just as surely as we intend to prohibit procuring of young females, we believe that these sections of the *Code*, to which the "illicit sexual conduct" definition applies should be rationalized, with their protection being extended to males as well as females.

Recommendation 93

> **Sections 146, 151, 152, and 153 of the Criminal Code should be amended in order to provide that the protection against sexual assault extended thereby to females is also available to males.**

Additionally, we note that many of the offences to which the "illicit sexual conduct" definition may refer require, as an element of the offence, that the victim be "of previously chaste character". It is not our intention to restrict the protection of the procuring provisions which we recommend; accordingly, we recommend that references to the previous chaste character be removed from the offences.

Recommendation 94

> **In offences involving sexual assault on young persons, the requirement that the victim be of "previously chaste character" should be removed from the Criminal Code.**

We have considered whether the problems raised by the use of our phrase "illicit sexual conduct" should require spelling out in our proposed section exactly what it is that we think is involved in illicit sexual conduct. Having considered this possibility, however, we have rejected it. We think that it is important for the procuring section to forbid procuring young people to perform acts which would themselves be illegal, whether the procuring had taken place or not. Thus, we want to maintain, in our procuring section, the reference to other *Code* offences.

We note with considerable interest that changes to this part of the *Code* have been recommended by the Committee on Sexual Offences Against Children and Youths.[15] Further, it would appear that extending the benefit of some of these *Code* provisions to males as well as to females may be mandated by the provisions of sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*. Accordingly, we urge not only the enactment of the section on procuring of young persons which we have outlined above, but also the rationalization of sections 140 to 157 of the *Criminal Code* which appears to be required.

Recommendation 95

> **The offences involving young persons set out in Part IV of the Code should be reviewed with the aim of rationalizing them by repealing outmoded sections.**

In our view, the proposed provisions on procuring will, when taken with our recommended provision on financial support from prostitution, substitute quite satisfactorily for the provisions of section 166 which are now, in our opinion, outmoded. The procuring proposal does not include the offence, now in section 166, of knowingly receiving the avails of the defilement, seduction or prostitution of the female child or ward, but our proposal to deal with financial support from prostitution will address this aspect of the conduct now dealt with by section 166.

We are mindful that previous reform attempts have all focused on trying to rework and broaden section 166, while leaving intact the basic approach of penalizing a parent, guardian or custodial adult more harshly for interference with children than is a third party. We also note, however, that attempts to follow this model have resulted in more and more complex proposals, in order to maintain the distinction between parents and third parties, as well as accommodate the various defences relevant to each separate offence. In our view, the basic offence created by our procuring proposal is one that can appropriately be applied to parents and guardians, as well as to third parties. The proposed penalty is serious enough to signal the gravity of the breach of social and emotional trust involved in a parent introducing his or her child to illicit sexual conduct. We do not think that a penalty of more than 14 years is required for parents committing such an offence. By the same token, we are not convinced that, given the seriousness of the offence, we should propose any lesser penalty for persons other than parents who engage in this conduct.

It may be noted that the proposed procuring provisions do not contain any term which replaces exactly the offence which is now found in section 167 of the *Criminal Code*. That section makes it an offence for the owner, occupier, or manager of premises, knowingly to permit a female person under the age of eighteen to resort to or be in the premises for the purpose of having illicit sexual intercourse with a particular male person or male persons generally. The harms aimed at by the offence are those of facilitating the sexual misconduct of a young female, and of facilitating male access to the young female. We note that the presence or absence of financial advantage to the manager of the premises is immaterial to the offence. In our view, this provision should be repealed altogether.

We acknowledge, of course, that previous efforts to rationalize the law in this area have included redrafted versions of this provision. However, we refrained from doing so because we think that the worst of the conduct reached by the section, namely facilitating sexual access to young persons, is addressed by the procuring provisions which we have recommended. We note that there have been very few reported cases under section 167 in this century. The section, as it now stands, could easily be used against friends or contemporaries of the young person who simply offer her the use of an apartment in which to engage in consensual sexual relations with a boyfriend of the same age. We consider such use inappropriate and recommend that this seldom used provision is better repealed than reformed.

Recommendation 96

Section 167 of the Criminal Code should be repealed.

We do not intend to suggest by the foregoing, however, that persons under 18 who procure the sexual activity for reward of other youths should escape the reach of the proposed section. In our opinion, a youth who preys on other youths does not deserve immunity from the law; such a person should be tried for the offence, pursuant to the procedures set out in the *Young Offenders Act*, in the same way as he or she would be charged and tried with any other offence he or she commits.

3.2 Financial Support from Prostitution

Recommendation 97

Section 195(1)(j) of the Criminal Code be repealed and replaced with a new prohibition against receiving financial support from prostitution, which would contain provisions dealing specifically with receiving support from the prostitution of those under 18. The section is:

(1) Everyone who by force, threat of force or other coercive or threatening behaviour induces a person of 18 years or older to support him or her financially in whole or in part by acts of prostitution is guilty of an indictable offence and liable to imprisonment for 14 years.

(2) Everyone who is supported financially in whole or in part by a person under 18 years of age from the proceeds of sexual activities by that young person for money or for other consideration or reward is guilty of an indictable offence and liable to imprisonment for 14 years.

(3) For purposes of subsection (2), evidence that a person lives with a person or persons under the age of 18 who engage in sexual activity for money or for other consideration or reward is, in the absence of evidence to the contrary, proof that that person is supported, in whole or in part, from the proceeds of that activity.

These provisions with respect to financial support from prostitution are intended to replace paragraph 195(1)(j) of the *Criminal Code*, which makes it an offence to live wholly or in part on the avails of the prostitution of another person. We have fashioned provisions which relate specifically to being supported from the proceeds of the activities of a juvenile prostitute. There are now no provisions of the *Code* addressing this issue separately, with the exception of the offence created by section 166 for a parent or guardian knowingly to receive the avails of the defilement, seduction or prostitution of a female person. We take the view that section 166 is too narrow because it relates only to female victims, and it does not reach the conduct of third parties who are receiving support from the activities of juvenile prostitutes. Accordingly, as we have done in other cases, we have given particular attention, in the drafting of our recommendations, to the situation of juveniles.

It will be noted that the offence involving adults depends on the presence of force, threat of force or other coercive or threatening behaviour being used. In all other situations, the conduct of the adult prostitute and his or her "dependents" is, in our view, no business of the criminal law. We must assume that an adult has the appropriate judgment to avoid being exploited, but, if he or she does not have that judgment, then we have concluded that the law must not interfere. As we argued in the case of the procuring provisions, regard for individual liberty and responsibility dictates that, at some point, societal protection against non-coercive behaviour must come to an end, however much protection may turn out to be needed in some individual cases.

By contrast, we think that society has an interest in protecting persons under 18. Society has an interest in their development free from what we regard as potentially harmful influences and activities, and society accordingly has a corresponding duty to shield them. Hence, we have made the offence of being supported from the proceeds of the sexual activities of a young person an offence which does not depend on the use of coercive behaviour. Even if the young person's contribution of support is voluntary, it would attract a charge under the proposed section.

Adult prostitutes told the Committee that the present provisions with respect to living on the avails of prostitution could jeopardize a person to whom the prostitute has an emotional attachment. They pointed out that a boyfriend with no job, or little income of his own, who lives with a prostitute or is supported by her, is liable to be charged under paragraph 195(1)(j) with living on the avails of prostitution. The risk extends, we were told, to other persons supported by the prostitute as part of her family or friendship network.

Our recommendations with respect to the person over 18 are intended to be responsive to this concern. Unless the support is exacted from the prostitute by coercive behaviour, then, in our view, society should not penalize the person who receives that support. We are not convinced that we should afford the same shelter for persons supported by the young person. The evidence before the Committee indicates that young people, particularly females, may be introduced to prostitution or maintained in it, by males with whom the young people believe they have an affectionate relationship. The creation of some sort of personal bond of this nature, being one of the methods of recruitment to prostitution, should not attract any comfort from the law, direct or indirect, to the unscrupulous who create such bonds.

The recommended offence, in the case of an adult, is that of coercing a person to support the accused financially "in whole or in part by acts of prostitution". In the case of the person under 18, the conduct generating the support is described as "sexual activites for money or for other consideration or reward". We believe that young people who receive, and pass on to others, payment in kind for sexual activities should also be protected against exploitation, just as we protect those who support others by means of monetary proceeds of sexual activity. We do not wish to encourage a person to manipulate the type of reward for sexual activity received by juveniles in order to escape criminal sanctions for being supported from those proceeds.

As mentioned, we think that the proposed financial support section is broad enough to cover the activities of parents, guardians and other adults in charge of young people who may be receiving benefit from their sexual activities. Given the strength of the penalty which we have attached to this offence, we see no need to create a separate offence referable only to this one class of adult exploiter. This section is also broad enough to cover receipt of support by another person under the age of 18. There appears to be no special reason for specifically excluding these persons from the application of the section. The methods of trial and disposition provided for in the *Young Offenders Act* provide adequate protection to the youth charged.

Subsection (3) of our proposed provision is a reworking of the presumption which now appears in the *Code* as subsection 195(2). That subsection, drafted in language reflecting the other concepts in section 195, provides that evidence that a person lives with or is habitually in the company of prostitutes, or lives in a common bawdy house or house of assignation, is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution. This presumption would apply to cases of living on the avails of the prostitution of the adult or the young person, because section 195 does not distinguish between these two types of case.

The presumption which we have created in the new subsection (3) applies only to the offence involving persons under 18. The offence dealing with adults depends on there being an actual showing of coercive behaviour. There is thus no need or justification for a presumption. The offence with respect to youths does not depend on this showing of violence or threat; the behaviour encompassed by the offence may present few outward, distinctive signs apart from the signal of residence. Thus, the effectiveness of law enforcement may well depend on the use of a presumption, that if certain facts are present, receipt of support from a young person's sexual activity can be assumed, in the absence of proof to the contrary.

In our opinion, living with a person or persons under 18 who engage in sexual activity for reward is a sufficiently distinctive characteristic to justify its use as a trigger for the presumption that a person is being supported from these proceeds. Maintenance of a common living place involves an element of shared decision making about the expenses of that living place. It is thus a characteristic rationally connected to the question of support. The "living with" test is more strict than the test in the present subsection 195(2) of being "habitually in the company" of prostitutes.

Once the element of "living with" has been established, we think that the state would be justified in calling upon the accused for an answer. The financial resources which the accused has at his or her command, the other calls on those resources, and an explanation of his or her sources of support are all particularly within the knowledge of the accused and of no one else. The provision that the presumption extend to someone who lives with "a person or persons" is intended to cover the situation of one who may be involved with more than one person and thus living full time with no one of them. We heard evidence at the hearings that a pimp may convince several people that he is their lover, spending some time with each, and telling none of his other involvements. We want the provisions with respect to financial support from sexual activity to reach this sort of person, as well as the person who is supported by only one young person.

3.3 Prostitution Establishments

We propose amendments to the existing provisions in section 193 of the *Criminal Code* relating to "common bawdy houses". We have replaced the historic terminology with the term "prostitution establishment" and have proposed that the sanctions against operating a prostitution establishment not apply to one or two persons over the age of 18 who perform acts of prostitution in their own homes. Moreover, we have recommended that the governments of the provinces consider development of programs whereby prostitution establishments could be licensed and regulated as other businesses are, such businesses to be exempt from the application of the *Criminal Code*.

We emphasize, however, that the person under 18 has no place in such an establishment. We do not intend by our proposals to create any enclave in which a young person may engage in prostitution, for to do so is merely to encourage the commercial instincts of any who would exploit that young person. It is clear to us that the exemption for one or two prostitutes operating from their own residence should be confined to persons 18 or over and that no provincial regulatory program should permit use of those under 18 in any licensed premises.

Recommendation 98

> **No person under 18 should be permitted to be employed in any prostitution establishment which might be set up pursuant to the exception for provincially regulated establishments provided in our proposal about prostitution establishments.**

3.4 Sexual Activity for Reward with Juveniles

Recommendation 99

> **The following new section should be added to the Criminal Code:**
>
> **(1) Everyone who engages in, or attempts or offers to engage in sexual activity for money or for other consideration or reward with a person under 18 years of age is guilty of an indictable offence and liable to imprisonment for five years.**

(2) It is no defence to a charge under this section that the accused believed the other person to be 18 years or older.

We think that it is essential that the *Criminal Code* contain an offence specifically framed around sexual activity for reward with a person under 18. There is no provision now in the *Code* which adequately addresses this sort of behaviour. The usefulness of section 195.1, the soliciting provision, is seriously impaired by the doubt in some jurisdictions concerning its applicability to customers and by the attitude toward enforcement generated by judicial interpretation of its provisions. The section cannot be counted upon at all to curb the sexual exploitation of the young. The *Criminal Code* provisions respecting sexual assault would not apply to the majority of the ordinary commercial transactions involving young persons because of the young person's consent to the behaviour. The provisions of child welfare legislation, which we have considered, have too diffuse an impact on this conduct.

Accordingly, we recommend the creation of a specific offence aimed at those who engage in, attempt or offer to engage in sexual activity for money or other consideration or reward with persons under 18. We have not limited the types of reward to the monetary ones because of our understanding that youths may receive food, lodging, or presents for sexual activities rather than money. The attempt and the offer are prohibited in order to emphasize the seriousness with which the behaviour is viewed. In our opinion, a young person who is even approached by an adult should be able to invoke the law enforcement process. To await the completion of the sexual activity before triggering the criminal process is to lose a substantial portion of the deterrent value of this provision. Moreover, including attempt and offer offences means that law enforcement authorities will be able to use surveillance methods instead of relying exclusively on undercover officers or child complainants in order to enforce the law. Use of undercover operations presents tremendous difficulties in the context of this offence, ranging from finding a youthful appearing officer, to the problem of securing convictions based upon evidence of an undercover complainant who is actually over 18.

The section is directed toward the party whom we think is more likely to be the "aggressor" in the contacts between the user and provider of the sexual services of youths. Included in that group is the person under 18 who as the customer engages in, or attempts or offers to engage in sexual activity for reward with another young person. The behaviour aimed at by the section is the instigation, or attempted instigation, of commercial sexual activities with a young person. A would-be customer under 18 who engages in this conduct should be charged, and tried according to the procedure provided in the *Young Offenders Act*.

Recommendation 100

A young person who engages in sexual activity for reward as the provider of sexual services should not be subject to a criminal penalty.

There are many reasons for our decision not to create such an offence. It appears to us as if enforcement of such a provision presents two equally undesirable alternatives. The provision could be enforced by way of undercover police activity. The prospect that officers would actually approach persons under 18 and try to engage their sexual services, for purposes of effecting an arrest, is very distasteful to us, and we are sure that it would be equally repelling to most police authorities. Alternatively, one can consider the possibility that customers, or prospective customers, would complain to police authorities.

It is doubtful whether customers who had actually received sexual services for a consideration would complain, because of the prospect of being charged themselves. We doubt that police officials would welcome an adult's offer to give evidence against a child in order that the adult might secure immunity from prosecution. However, the adult customer could well use the threat of a report to the police in order to control the behaviour of the young person. Whether the threat were groundless would not matter if the youth believed that the customer would carry it through. The danger of blackmail is, in our view, real enough to merit caution about creating this offence.

Even if the customer or would-be customers were not inclined to blackmail, one wonders about the effectiveness of an enforcement system dependent to any significant degree on complaints. The most likely persons to bring complaints are persons who are offered but do not accept the services. Yet indifference, a desire to avoid involvement in the criminal justice system and even compassion may inhibit complaints from these individuals.

The question of the equity of our proposal must, of course, be faced. We have recommended penalizing one actor in a sexual transaction, or would-be transaction, while leaving the other outside the reach of the prohibition. Some have mentioned in the Committee hearings the possibility that youths will be the aggressors in these situations, and that a manipulative youth may well threaten to blackmail a customer. We must take those possibilities into account when assessing the impact and the fairness of our recommendation.

We point out that an adult prostitute suffers no criminal sanction for the straightforward activity of sale of sexual services, under our recommendations or, with one or two exceptions, under the present *Criminal Code*. We do not believe that there is any justification for penalizing in a young person what is not criminal when done by an adult. The rationale that is sometimes advanced for making sale of sexual services by a youth an offence is that it would have the beneficial effect of bringing the young person into contact with law enforcement officials and social agencies which would help break the links of the child to the life of prostitution. We have received little or no evidence of the efficacy of such intervention. In fact, the evidence we have received tends to show that this expected benefit will not arise, because young people are out on the street again within hours of arrest, and because effective rehabilitative programs are either seriously crowded or simply disappearing because of government restraint programs. Such a notional support system cannot possibly justify the criminalization of conduct by a youth which would not be criminal by an adult.

In fact, when one analyses the thrust of our recommendations, one sees that the difference in treatment under the law would be a difference between the customer of the adult prostitute and the customer or would-be customer of the youth. We think that there is ample justification for imposing sanctions on the customer of the youth. We heard arguments at the public hearings that penalizing the customer is an effective method of reducing the market for sexual services. We also heard complaints at the public hearings and in some private sessions that the penalties now applied to those who sexually exploit children are pitifully light, amounting to no sort of deterrent at all.

We consider use of children in commercial sexual activities to be a serious harm which should be deterred, because of what is often the imbalance of power and resources between perpetrator and victim, and the lasting interference with the child's personal integrity, both mental and physical. Accordingly, we consider it appropriate that a means which we have reason to believe will be effective as a deterrent, and which can be enforced by orthodox and acceptable law enforcement methods, should be employed to curb resort to children for commercial sex. We have considered it unnecessary to resort to punish the customers of adult prostitutes, because the social harm to adult prostitutes is arguably somewhat less than affecting children, and because we take the view that society can and should accord to adults more autonomy in their own lives and more responsibility for their own well being.

3.5 Disorderly Conduct, Indecent Exhibition, Loitering, Soliciting

It is not our intention to criminalize street soliciting *per se*. Rather, we have chosen to deal with the problem of street soliciting which presents itself to nearby residents and those who seek to use the streets and other public and private facilities, where prostitutes ply their trade. This problem is the nuisance created by some prostitutes, some customers, and sightseers, in any location which becomes a regular site of prostitution activity.

We have proposed the following revision of section 171 of the *Criminal Code:*

(1) Everyone who
  (a) not being in a dwelling house causes a disturbance in or near a public place,
    (i) by fighting, screaming, shouting, swearing or using insulting or obscene language,
    (ii) by using sexually offensive remarks or suggestions,
    (iii) by being drunk, or
    (iv) by impeding or molesting other persons,
  (b) openly exposes or exhibits an indecent exhibition in a public place,
  (c) loiters in a public place and in any way obstructs persons who are there,

(d) stands, stops, wanders about in or drives through a public place for purposes of offering to engage in prostitution or of employing the services of a prostitute or prostitutes and on more than one occasion
(i) beckons to, stops or attempts to stop pedestrians or attempts to engage them in conversation,
(ii) stops or attempts to stop motor vehicles,
(iii) impedes the free flow of pedestrian or vehicular traffic, or of ingress or egress from premises adjacent to that public place,

(e) disturbs the peace and quiet of the occupants of a dwelling house by discharging firearms, by any of the forms of conduct in paragraphs (a), (b), (c) or (d) of this subsection, or by other disorderly conduct in a public place,

(f) not being an occupant of a dwelling house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of the building or structure to which at the time of such conduct, the occupants of two or more dwelling houses comprised in the building or structure have access as of right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction.

We do not, as we have stated, recommend creating an offence which focuses on the sale of sexual services by young persons. However, we see no good reason why young persons who are using the streets and offend against any of the provisions of the redrafted section 171 should not be charged with that offence. The trial and disposition after conviction of any such youngster would be governed by the *Young Offenders Act*. We consider that this statute offers sufficient procedural protection to the young person.

Recommendation 101

Persons under 18 who are using the streets and commit any of the nuisances prohibited in our proposed section 171 of the Criminal Code should be prosecuted in accordance with that section.

Footnotes

[1] John S. Kiedrowski and Jan Van Dijk, *Pornography and Prostitution in Denmark, France, West Germany, The Netherlands and Sweden* W.P.P.P.#1 at 100.

[2] Badgley Report, Vol. I, at 67.

[3] *Attorney General of Nova Scotia et al* v. *MacIntyre* (1982), 132 D.L.R. (3d) 385 (S.C.C.), *per* Dickson, J. at 401.

[4] *R.* v. *Quesnel and Quesnel* (1979) 51 C.C.C. (2d) 270 (Ont. C.A.) *per* Brooke, J.A. at 274-5.

[5] *R.* v. *Quesnel and Quesnel*, (1979).

[6] *Re F.P. Publications (Western) Limited and The Queen* (1979), 108 D.L.R. (3d) 153 (Man.C.A.).

[7] *R.* v. *Several Unnamed Persons* (1983), 44 O.R. (2d) 81 (Ont.H.C.).

[8] 1984 Unreported (Ont.H.C.).

[9] *Canadian Newspapers Company Limited* v. *A.-G. for Canada; R.V.D.D.*, Feb. 1985 Unreported (Ont.C.A).

[10] *Canadian Newspapers* v. *A-G for Canada; R.V.D.D.* Feb. 1985 unreported at 30.

[11] *Canadian Newspapers* v. *A-G for Canada; R.V.D.D.* Feb. 1985 unreported at 38-39

[12] (1984), 13 C.C.C. (3d) 152 (Ont.H.C.).

[13] (1984), 13 C.C.C. (3d) 152 (Ont.H.C.).

[14] *Criminal Code*, ss. 146, 151, 152, 153.

[15] Badgley Report, Vol. I, at 46-48.

Chapter 47

Education and Social Services

The reform of the law with respect to child pornography and prostitution cannot be seen as the only action necessary to provide children and young people with better conditions in which to reach maturity. The law is not a particularly effective tool to bring about fundamental changes in the attitudes and behaviour of large numbers of people and organizations. While law clearly has role in defining the limits of acceptable behaviour, it is less likely to affect the more subtle aspects of the issues with which we are concerned. The law can and must state that activities, such as buying the sexual services of juveniles, or using them to make pornographic material, are unacceptable. But it is difficult to use the law to arrest a gradual shift towards acceptance of sexual relations between young children and adults or of the notion that the satisfaction of sexual desires justifies any and all indignities to one's partner.

Similarly, using the law may not be the most effective means of undermining long held and erroneous beliefs about sexual equality or sexual preference. Here it becomes evident that the need for education in the widest sense of the word is essential. This was a view expressed by many who made submissions to the Committee and one which we strongly endorse. Programs addressed to the public in general, specific professional groups in particular and to children and young people are needed.

It is assumed that, if programs are directed towards today's children, we will eventually have adults who are better informed about human sexuality and less likely to depend on misleading and erroneous material such as pornography. This is clearly a long term and slowly attained objective, but it is the core of any action to lessen the dependency on and effect of pornography. In addition, accurate information about the buying and selling of sexual services and the harms associated with such activities for young people should be available to counteract the partial and misleading information which is often contained in the media.

Although the focus of attention must be on children and young people, the integrity of the programs depends on the understanding of adults about such issues. It is important, therefore, that parents and adults with whom children come into contact in a professional way, for example, teachers, social workers and the medical profession, are informed and understanding of both adult sexuality and the developing sexuality of children. We do not believe that the education of children can or should be left just to the school system. Parents, religious groups and other organizations indicated their wishes for involvement in the process and this we consider entirely appropriate and to be encouraged. We need, however, to ensure that adults do have the requisite understanding of the issues and how the information can be given in a way appropriate to a child's level of comprehension.

More generally, we consider it important that the Canadian population as a whole be better informed about the rights of children and the developmental processes which are part of the child's growth towards maturity. If we have a better understanding of individual and societal responsibilities towards children, it is hoped that children can grow up free of exploitation and harmful interference. In order to achieve these objectives we believe that it is necessary to promote programs and make more widely available the necessary information rather than simply hope that, in some vague and unspecified way, young people and adults will learn what they think they need to know.

Educational programs for children and in relation to sex or family life education are not the only areas in need of attention. As we were often reminded, pornography is just one part of the mass media and shares many common elements with mainstream communications. Children using the media receive implicit if not explicit messages about such issues as the role of women, how to be successful in life, and the commodities necessary in order to be happy. Despite the overwhelming presence of the media in our lives, we do little to educate children about how they should interpret the messages they receive or how and why the programs on television, for instance, are constructed in a particular way. There is, therefore, a real need to increase children's awareness of these issues through what was sometimes referred to as media literacy programs.

As will be evident, the distinction between media literacy programs and sex education and family life programs is not necessarily clear. Rather they are inter-connected and inter-dependent since, in the final analysis, our concern is that children learn about the dignity and worth of human beings in all their variations and subtleties. The brief from the B.C. Teachers' Federation spoke to these issues and represents the concerns and interests of many groups who came before the Committee:

> The communications media have long been acknowledged as an important tool in the educational process. Video, films, records, magazines and other media have great influence on the values and behaviour of people, whether or not they have been designed as educational materials. Young people are particularly susceptible to this influence because they lack the analytical skills to evaluate the effects of the media upon them. Images present in the mass media have become ever more pornographic over the last decade. Society has increasingly allowed these images to become an acceptable and normal component of entertainment. The juxtaposition of 'sex' and overtly aggressive behaviour—from beatings to rape—is commonly found on prime-time television.

> Children are impressionable. Their perceptions of the world and of the roles of men and women as sexual beings in the world are im an (sic) process of development. Children seek self-definition and strive to create individual and special identities, of which an important part is sexuality. The function or (sic) role models in this process is paramount. Children define themselves and learn to be 'attractive' and 'desirable' within externally established limitations. These limitations are set out by an adult-conceived and controlled 'teen culture' that provides role models which are strong determinants in the development of self-image, of personal sexuality and of the perception of others as sexual beings. Elements of that, 'teen culture', which begins with eight-year-olds, include advertising, rock music, rock videos, and television and film.

As the Canadian Teachers' Federation indicated, programs of media literacy should be designed, among other things:

(a) to decrease children's belief that TV programs depict real life;

(b) to increase children's tendencies to compare what they see on TV with other information sources;

(c) to decrease television's credibility by teaching children about economic and production aspects of television.

While the emphasis on educational programs is justifed with respect to the more long term goals, children in need of special care and protection have to receive immediate attention. As we do not believe that children should be regarded as criminals, it is essential that social services and programs be in place to meet the needs of young people. Our level of success to date in this regard is not satisfactory.

This lack of success is due in part to the need for specialized training for those working with children with problems; in part to the lack of specialized programs which address the specific needs of the children, and in part to the lack of commitment to fund social programs designed to assist children. Although we are emphasizing the needs of children, it is apparent that these needs often arise because of the failure of other units in society adequately to care for the young people. It is more than likely, therefore, that many of the needs of children cannot be addressed in isolation from the family or school.

Perhaps one of the most disheartening aspects of the whole phenomenon of child prostitution is the frequency with which young people have come into contact with social service agencies and the seeming inability of these agencies to be of real assistance. If we are indeed serious about protecting children from the exploitative and destructive aspects of our society, then we have to commit ourselves to a sustained effort in educating professionals, developing programs, and allocating the necessary resources. There are some examples of effective and innovative programs across the country, but all too frequently our efforts have been meagre and subject to the financial vagaries of govenment funding.

The leadership and assistance of governments at all levels will be needed to implement appropriate educational and social service programs. It is not expected, however, that governments will be the only or major presence in these activities. Indeed, many of those making submissions to the Committee indicated a clear preference for joint and collaborative action between governments and existing organizations and agencies. There are organizations which have developed expertise and programs in some of the areas of concern, and rather than ignoring this, it is necessary to learn of these efforts and support their further development and more widespread use whenever possible and appropriate. Organizations such as Media Watch and Planned Parenthood Associations can offer assistance in media literacy and sex and family life education programs as can religious organizations and provincial authorities. Their efforts should be encouraged and not duplicated.

Recommendations

Some of the recommendations in other parts of the Report, if implemented, will have an impact on children and the care we give them. In this section, however, we are making recommendations which are designed to have a specific effect on children and their environment. Although responsibility for many aspects of children's well-being is within provincial jurisdiction, it is our view that, in order adequately to address the needs of children, there must be co-operation, financial and other assistance among the federal, provincial and municipal governments and between governments and private agencies and organizations. There should be encouragement to develop new approaches and recognition that overly standardized programs may not be effective in meeting the different levels of need and the different experiences across the country.

Recommendation 102

Federal, provincial and territorial governments should reaffirm their commitment to providing an environment where all children have the opportunity to develop to the fullest extent, their intellectual, physical and spiritual attributes. To this end, the Secretariat proposed in this Report should give high priority to issues affecting children and young people.

Recommendation 103

The federal government should collaborate with and assist the provinces, territories and private organizations and agencies in the development of educational programs for children, and those with special responsibilties for the welfare of children, in the areas of family life, human sexuality and media literacy.

Recommendation 104

Provincial and territorial governments should give high priority to programs in family life, human sexuality and media literacy at all levels within the school system.

Recommendation 105

The federal government should collaborate with and assist the provinces, territories, and private organizations and agencies in assessing the effectiveness of social service programs designed to assist children and young people, in developing new programs and in implementing changes designed to better meet the needs and current realities of young people in the 1980s and 1990s.

Part V

Summary of Recommendations

Chapter 48

Recommendations on Pornography

1. Criminal Code

Recommendation 1

> The term "obscenity" should no longer be used in the Criminal Code, and the heading "Offences Tending to Corrupt Morals" should also be removed.

Recommendation 2

> New criminal offences relating to "pornography" should be created, with care being exercised to ensure that the definition of the prohibited conduct, material or thing is very precise.

Recommendation 3

> The federal government should give immediate consideration to studying carefully the introduction of criminal sanctions against the production or sale or distribution of material containing representations of violence without sex.

Recommendation 4

> There should be no sanctions introduced respecting material that is 'disgusting' even though our proposed repeal of section 159 would remove the existing offence related to a disgusting object.

Recommendation 5

> Controls on pornographic material should be organized on the basis of a three-tier system. The most serious criminal sanctions would apply to material in the first tier, including a visual representation of a person under 18 years of age, participating in explicit sexual conduct, which is defined as any conduct in which vaginal, oral or anal intercourse, bestiality, necrophilia, masturbation, sexually violent behaviour, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted. Also included in tier one is material which advocates, encourages, condones, or presents as normal the sexual abuse of children, and material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted.
>
> Less onerous criminal sanctions would apply to material in the second tier. Defences of artistic merit and educational or scientific purpose would be available. The second tier consists of any matter which depicts or describes sexually violent behaviour, bestiality, incest or necrophilia. Sexually violent

behaviour includes sexual assault, and physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

Material in the third tier would attract criminal sanctions only when it is displayed to the public without a warning as to its nature or sold or made accessible to people under 18. In tier three is visual pornographic material in which is depicted vaginal, oral, or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body or the lewd exhibition of the genitals, but no portrayal of a person under 18 or sexually violent pornography is included.

Recommendation 6

The provinces and the municipalities should play a major role in regulation of the visual pornographic representations that are not prohibited by the Criminal Code through film classification, display by-laws and other similar means. The provinces should not, however, attempt to control such representations by means of prior restraint.

Recommendation 7

Section 159 of the Criminal Code should be repealed, and replaced with the following provision:

PORNOGRAPHY CAUSING PHYSICAL HARM

159(1)(a) Everyone who makes, prints, publishes, distributes, or has in his possession for the purposes of publication or distribution, any visual pornographic material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted, is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or rent or has in his possession for the purpose of sale or rent any visual pornographic material which was made or produced in such a way that actual physical harm was caused to the person or persons depicted is guilty

(i) of an indictable offence and is liable to imprisonment for two years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(c) "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, sexually violent behaviour, bestiality, incest, necrophilia, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

SEXUALLY VIOLENT AND DEGRADING PORNOGRAPHY

159(2)(a) Everyone who makes, prints, publishes, distributes or has in his possession for the purposes of publication or distribution any matter or thing which depicts or describes:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest, or
(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(b) Everyone who sells, rents, offers to sell or rent, receives for sale or has in his possession for the purpose of sale or rent any matter or thing which depicts or describes:
   (i) sexually violent behaviour;
   (ii) bestiality;
   (iii) incest, or
   (iv) necrophilia

is guilty
   (i) of an indictable offence and is liable to imprisonment for two years, or
   (ii) of an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1,000 or to imprisonment for six months or to both.

(c) Everyone who displays any matter or thing which depicts
   (i) sexually violent behaviour;
   (ii) bestiality;
   (iii) incest; or
   (iv) necrophilia

in such a way that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of
   (i) an indictable offence and is liable to imprisonment for two years, or
   (ii) an offence punishable on summary conviction and is liable to a fine of not less than $500 and not more than $1000 or to imprisonment for six months or to both.

(d) Nobody shall be convicted of the offence in subsection (2)(a) who can demonstrate that the matter or thing has a genuine educational or scientific purpose.

(e) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing has a genuine educational or scientific purpose, and that he sold, rented, offered to sell or rent or had in his possession for the purpose of sale or rent the matter or thing for a genuine education or scientific purpose.

(f) Nobody shall be convicted of the offences in subsections (2)(a) and (2)(b) who can demonstrate that the matter or thing is or is part of a work of artistic merit.

(g) Nobody shall be convicted of the offence in subsection (2)(c) who can demonstrate that the matter or thing
   (i) has a genuine educational or scientific purpose; or
   (ii) is or is part of a work of artistic merit,
   and
   (iii) was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the display therein,

(h) In determining whether a matter or thing is or is not part of a work of artistic merit the Court shall consider the impugned material in the context of the whole work of which it is a part in the case of a book, film, video recording or broadcast which presents a discrete story. In the case of a magazine or any other composite or segmented work the court shall consider the impugned material in the context of the specific feature of which it is a part.

DISPLAY OF VISUAL PORNOGRAPHIC MATERIAL

159(3)(a) Everyone who displays visual pornographic material so that it is visible to members of the public in a place to which the public has access by right or by express or implied invitation is guilty of an offence punishable on summary conviction.

(b) No one shall be convicted of an offence under subsection (1) who can demonstrate that the visual pornographic material was displayed in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the display therein of visual pornographic material.

(c) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts of the genital parts of the body, or the lewd exhibition of the genitals, but does not include any matter or thing prohibited by subsections (1) and (2) of this section.

FORFEITURE OF MATERIAL

159(4) In any proceedings under section 159(1)(a) and (b), 159(2)(a) and (b), and 164, where an accused is found guilty of the offence the court shall order the offending matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

ABSENCE OF DEFENCE

159(5) It shall not be a defence to a charge under sections 159(1)(a) and 159(2)(a) that the accused was ignorant of the character of matter or thing in respect of which the charge was laid.

DUE DILIGENCE DEFENCE

159(6) Nobody shall be convicted of the offences in sections 159(1)(b) and 159(2)(b) who can demonstrate that he used due diligence to ensure that there were no representations in the matter or thing which he sold, rented, offered for sale or rent, or had in his possession for purposes of sale or rent, which offended the section.

DIRECTORS

159(7) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

DEFINITIONS

159(8) For purposes of this section, "sexually violent behaviour" includes

(i) sexual assault,

(ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, depicted for the apparent purpose of causing sexual gratification to or stimulation of the viewer.

Recommendation 8

Section 160 of the Code, allowing forfeiture proceedings to be brought, as an alternative to a criminal charge, should be retained in the Code but its application should be limited to tier one and tier two material.

Recommendation 9

To clarify the law on this point, section 160 should be amended to make it clear that the onus rests on the Crown under this section to prove beyond a reasonable doubt that the material comes within either tier one or tier two.

Recommendation 10

Section 161 of the Code should be amended as follows:

> 161. Everyone who refuses to sell or supply to any other person copies of any publication for the reason only that such other person refuses to purchase or acquire from him copies of any other publication that such other person is apprehensive may offend section 159(1) or section 159(2) of the Code is guilty of an indictable offence and as liable to imprisonment for two years.

Recommendation 11

Section 162 of the Code should be repealed.

Recommendation 12

Section 164 of the Code should be repealed and replaced by:

MAILING PORNOGRAPHIC MATERIAL

164(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

- (a) depicts or describes a person or persons under the age of 18 years engaging in sexual conduct,
- (b) advocates, encourages, condones, or presents as normal the sexual abuse of children

is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who makes use of the mails for the purpose of transmitting or delivering any matter or thing which:

- (a) by virtue of its character gives reason to believe that actual physical harm was caused to the person or persons depicted, or
- (b) depicts or describes:
  - (i) sexually violent behaviour,
  - (ii) bestiality,
  - (iii) incest, or
  - (iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who makes use of the mails for the purpose of transmitting or delivering unsolicited visual pornographic material to members of the public is guilty of an offence punishable on summary conviction.

(4) Nobody shall be convicted of the offence in subsection (2)(b) who can demonstrate that the matter or thing mailed

- (i) has and is being transmitted or delivered for a genuine educational or scientific purpose, or
- (ii) is or is part of a work of artistic merit.

(5) It shall not be a defence to a charge under subsections (1) and (2) of this section that the accused was ignorant of the character of the matter or thing in respect of which the charge was laid.

(6) For purposes of this section "visual pornographic material" includes any matter or thing in or on which is depicted vaginal, oral or anal intercourse, masturbation, sexually violent behaviour, incest, bestiality, necrophilia, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 13

Section 165 of the Criminal Code should be repealed.

Recommendation 14

Section 163 of the Code should be repealed and replaced by:

LIVE SHOWS

163(1) Everyone who, being the owner, operator, lessee, or manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for ten years.

(2) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which

(a) involves actual physical harm is being caused to a person participating in the performance, or

(b) represents:

(i) sexually violent behaviour;
(ii) bestiality;
(iii) incest; or
(iv) necrophilia

is guilty of an indictable offence and liable to imprisonment for five years.

(3) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives, or allows to be presented or given therein without appropriate warning a performance in which explicit sexual conduct is depicted

is guilty of an offence punishable on summary conviction.

(4) It shall not be a defence to a charge under subsections (1) and (2) that the accused was ignorant of the character of the production.

(5) Nobody shall be convicted of the offence under subsection (2)(b) who can demonstrate that

(i) the performance is or is part of work of artistic merit; and
(ii) the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(6) For purposes of subsection 3 it shall be sufficient to establish that an appropriate warning was given that the performance was presented or given in a place or premises or a part of premises to which access is possible only by passing a prominent warning notice advising of the nature of the performance.

(7) For purposes of subsection 3 "explicit sexual conduct" includes vaginal, oral or anal intercourse, masturbation, lewd touching of the

breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 15

The provinces and the municipalities should play a major role in regulation of live performances involving sexual activity that are not prohibited by the Criminal Code, through licensing, zoning and other similar means.

Recommendation 16

Section 170 of the Criminal Code should be amended to add the following provision:

> This section has no application to a theatre or other place licensed to present live shows

2. Canada Customs

Recommendation 17

The amendments we have proposed to the Criminal Code with respect to prescribed pornographic material should be incorporated by reference into the list of goods prohibited entry into Canada by Schedule C of the Customs Tariff and incorporated by reference into the Customs Act.

Recommendation 18

If, in administering the Customs Tariff, it becomes necessary for Customs to formulate descriptions of pornographic material more precisely than do our Criminal Code recommendations, Customs should put such formulations in the form of Regulations rather than internal policy guidelines or memoranda.

Recommendation 19

The Criminal Code should be amended to provide that it be an offence to import into Canada pornographic material proscribed by the Criminal Code.

Recommendation 20

Judges should be entitled to consider at the time of sentencing a person convicted of dealing in one manner or another with proscribed pornographic material that the person disclosed to law enforcement officers the source of the material in question.

Recommendation 21

The federal government should give higher priority than it now does to the control of the importation of pornography.

Recommendation 22

The basic 1977 policy guidelines on the interpretation of prohibited goods should be immediately revised to contain more precise and contemporary formulations of characteristics which must be present to make materials "immoral or indecent".

Recommendation 23

The jurisdiction to clear film and video recordings for importation into Canada should remain with Canada Customs. The jurisdiction to classify film and video recordings for sale or rent or public showing should remain with the provincial film classification boards.

Recommendation 24

Co-operation between Customs and provincial film classification boards should continue in order that the classification of film and video recordings can take place as part of a single, integrated administrative procedure.

Recommendation 25

Film or video recordings referred by Customs to provincial classification boards should remain in the continuous control of both agencies until the classification and clearance process is complete.

Recommendation 26

The management information services of Customs should be upgraded to provide an adequate central data base and the ancillary systems necessary to capture, store and retrieve information relating to the importation of prohibited material into Canada.

Recommendation 27

Customs should be adequately equipped to fulfill its responsibilities in contributing to the information flow required for an effective interface between the resources of Customs and law enforcement agencies.

Recommendation 28

Customs should investigate the practicality of charging appropriate fees for the filing and hearing of appeals from classification decisions.

Recommendation 29

Customs, as part of a combined project to be undertaken with the Department of Communications and the CRTC, should examine the Customs implications involved in trans-border telecommunication of pornographic material.

3. Canada Post

Recommendation 30

The Postal service should assign policy and administrative priority to the effective control of distribution of pornographic material by mail. We further recommend that the postal service actively participate with the RCMP and the Customs service in gathering and exchanging information and data in an effort to better co-ordinate effective investigation and enforcement techniques to control the distribution of pornographic material by mail.

4. Broadcasting and Communications

Recommendation 31

The amendments we have proposed to the Criminal Code with respect to proscribed pornographic material should be incorporated by reference into Regulations passed or to be passed by the CRTC pursuant to the Broadcasting Act with respect to all broadcast media.

Recommendation 32

Canada should take the initiative to immediately open discussions on the international regulation of both public broadcasting signals and private signals emanating from fixed satellite services.

Recommendation 33

The CRTC should conduct the appropriate research into and promote appropriate public discussion about technology capable of scrambling and descrambling satellite signals, in order that there can be a measure of practical control over the transmission and reception of satellite signals.

Recommendation 34

Upon the issuing or renewal of a broadcast licence, a licensee should be required to post a bond in an appropriate amount to ensure compliance with the Regulations and conditions of licence relating to program content. In the event that a complaint about program content is upheld by the CRTC, the Commission should have the discretion to compensate the complainant for the costs incurred in presenting the complaint, such costs to be paid the licensee and secured by the aforesaid bond.

5. Human Rights

Recommendation 35

Human rights commissions should vigorously explore the application of their existing legislation and jurisprudence to pornography issues, including exposure to pornography in the workplace, stores and other facilities. However, we do not recommend that a separate pornography-related offence be added to human rights codes at this time.

Recommendation 36

Legislation along the lines of the Civil Rights Protection Act, 1981 of British Columbia should be enacted in all Canadian provinces and territories to provide a civil cause of action in the courts in respect of the promotion of hatred by way of pornography, and the existing British Columbia Act itself should be extended to cover the promotion of hatred by way of pornography.

Recommendation 37

Even if legislatures decide to include in human rights codes a specific pornography-related provision, we recommend that the civil cause of action described in Recommendation 36 be provided as an alternative.

6. Hate Literature

Recommendation 38

The definition of "identifiable group" in subsection 281.1(4) of the Criminal Code should be broadened to include sex age, and mental or physical disability, at least insofar as the definition applies to section 281.2 of the Code.

Recommendation 39

The word "wilfully" should be removed from section 281.2(2) of the Code, so as to remove the requirement of specific intent for the offence of promoting hatred against an identifiable group.

Recommendation 40

The requirement in s.281.2(6) that the Attorney General consent to a prosecution under s.281.2(2) should be repealed.

Recommendation 41

The text of subsection 281.2(2) should be amended to make it clear that graphic representations which promote hatred would be covered by the provision. The subsection could prohibit "publishing statements or visual representations or any combination thereof, other than in private communications" which promote hatred against any identifiable group.

7. Film Classification and Censorship

Recommendation 42

Canada should not opt for a national film review system, but rather maintain the existing arrangement whereby review is done on a province by province basis.

Recommendation 43

Those provinces and territories which have not implemented a film review system should consider doing so.

Recommendation 44

Film review boards and Customs authorities should not enter into arrangements whereby local film review boards have de facto control over what enters Canada; we further recommend that the 60-day clearance period allowed by Customs to films entering by way of Québec ports be discontinued.

Recommendation 45

Provincial film review boards should have an explicit statutory mandate to refuse to permit exhibition in the province of films which are contrary to the Criminal Code. Provincial film review boards should not be empowered to prohibit or cut films which are not contrary to the Criminal Code.

Recommendation 46

Provincial film review legislation or regulations should contain explicit standards to govern the boards' activities in classifying and, where these powers exist, in prohibiting and cutting films.

Recommendation 47

The provinces should not exercise a power of prior restraint over advertising of films; however, the power to require that film classifications be included in an advertisement should be kept.

Recommendation 48

Clearance for exhibition by a provincial authority should not constitute a defence or a discretionary bar to a prosecution under the Criminal Code, with the exception that a film classification permitting a film to be shown to persons under 18 will constitute a defence to a charge of displaying visual pornographic material to a person under 18.

Recommendation 49

Each province should establish a system of review and classification for video recordings intended for private use in the province. Under such a system, the review board should be given an explicit statutory mandate to refuse to classify video recordings which are contrary to the Criminal Code but not be empowered to prohibit or cut video recordings which are not contrary to the Criminal Code.

Chapter 49

Recommendations on Prostitution

Recommendation 50

The government of Canada in conjunction with the governments of the provinces and territories should strengthen both their moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference.

Recommendation 51

The government of Canada in conjunction with the governments of the provinces and territories should ensure that there are adequate social programs to assist women and young people in need.

Recommendation 52

The government of Canada in co-operation with the provinces and territories, should provide financial support for both research into and the implementation of sensitive and relevant educational programs on human sexuality for use in the country's schools; in particular the governments should jointly fund a National Centre and Program in Sexuality and Life Education to bring together the leading scholars and clinicians in the field to conduct research and formulate program and pedagogical models.

Recommendation 53

The government of Canada in conjunction with the governments of the provinces and territories should undertake the direct funding or indirect financial support of community groups involved in the care and welfare of both practising and reformed prostitutes, so that adequate social, health, employment, educational and counselling services are available to them.

Recommendation 54

The Government of Canada in co-operation with the governments of the provinces and territories should commission further research on prostitution as a means of informing attempts to address it as a social phenomenon, and to deal effectively with its adverse impact on those who are or who have been involved in it.

Recommendation 55

The prostitution related activities of both prostitutes and customers should be removed from the Criminal Code, except insofar as they contravene non-prostitution related Code provisions, and do not create a definable nuisance or nuisances.

Recommendation 56

In the Criminal Code provisions dealing with exploitative conduct other than running a prostitution establishment, the concern of the criminal law should be confined to conduct which is violent or which threatens force; special police details or units should be established, and adequately funded, where required, to investigate and prosecute violent and abusive procurers and pimps; any prostitution business which operates without contravening the Criminal Code should be subject to municipal regulation.

Recommendation 57

The criminal law relating to prostitution establishments should be drawn so as not to thwart the attempts of small numbers of prostitutes to organize their activities out of a place of residence, and so as not to prevent provinces from permitting and regulating small-scale, non-residential commercial prostitution establishments employing adult prostitutes.

Recommendation 58

STREET PROSTITUTION

1. Repeal section 195.1 of the Criminal Code.
2. Amend section 171 of the Criminal Code as follows:

SECTION 171(1): DISORDERLY CONDUCT, INDECENT EXHIBITION, LOITERING, SOLICITING, ETC.

(1) Everyone who

(a) not being in a dwelling house causes a disturbance in or near a public place,

(i) by fighting, screaming, shouting, swearing or using insulting or obscene language,

(ii) by using sexually offensive remarks or suggestions,

(iii) by being drunk, or

(iv) by impeding or molesting other persons,

(b) openly exposes or exhibits an indecent exhibition in a public place,

(c) loiters in a public place and in any way obstructs persons who are there,

(d) stands, stops, wanders about in or drives through a public place for purposes of offering to engage in prostitution or of employing the services of a prostitute or prostitutes and on more than one occasion

(i) beckons to, stops or attempts to stop pedestrians or attempts to engage them in conversation,

(ii) stops or attempts to stop motor vehicles,

(iii) impedes the free flow of pedestrian or vehicular traffic, or of ingress or egress from premises adjacent to a public place

(e) disturbs the peace and quiet of the occupants of a dwelling house by discharging firearms, by any of the forms of conduct in paragraphs (a), (b), (c) or (d) of this subsection, or by other disorderly conduct in a public place,

(f) not being an occupant of a dwelling house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling house comprised in the building or structure by discharging firearms or by other disorderly conduct

> in any part of the building or structure to which at the time of such conduct, the occupants of two or more dwelling houses comprised in the building or structure have access as of right or by invitation, express or implied,

is guilty of an offence punishable on summary conviction subject to a maximum fine of $1,000.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a), (d), (e) or (f) was caused or occurred.

3. Remove definition of "public place" from section 179(1) of the Criminal Code, and revise the definition of "public place" in section 138 of the Code to read:

   'public place' includes any place to which the public have access as of right or by invitation, express or implied, doorways and hallways of buildings adjacent to public places and to vehicles situated in public places.

Recommendation 59

PROCURING

1. Substitute for the existing section 195(1) the following:

   Everyone who
   - (a) by force, threat of force or by other coercive or threatening behaviour induces a person of 18 years or older to engage in prostitution with another person or generally,
   - (b) by force, threat of force or by other coercive or threatening behaviour compels a person of 18 years or older to continue engaging in prostitution with another person or generally is guilty of an indictable offence and liable to imprisonment for 14 years.

2. Repeal subsections (3) and (4) of section 195.

Recommendation 60

FINANCIAL SUPPORT FROM PROSTITUTION

1. Substitute for section 195(1)(j) (living on the avails) the following:

   Everyone who by force, threat of force or other coercive or threatening behaviour induces a person of 18 years or older to support him financially in whole or in part by acts of prostitution is guilty of an indictable offence and liable to imprisonment for 14 years.

2. Repeal subsection (2) of section 195(1).

Recommendation 61

PROSTITUTION ESTABLISHMENTS

1. Replace existing section 193 of the Criminal Code with the following provision:

   (1) Everyone who operates or aids in the operation of any place which is used in whole or in part for purposes of prostitution is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Everyone who as owner, landlord, lessor, tenant, occupier, or otherwise having charge or control of any place, knowingly permits it to be let or used for purposes of prostitution is guilty of an offence punishable on summary conviction, subject to a maximum fine of $5,000.

(3) This section does not apply to:
  (a) a place of residence in which two residents of 18 years or more of age of that place engage in acts of prostitution;
  (b) a prostitution establishment licensed and operated in accordance with a regulatory scheme established by the provincial or territorial legislature in that jurisdiction.

(4) Where a person is convicted of an offence under subsection (1) the court shall cause a notice of the conviction to be served on the owner, landlord, or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(5) Where a person upon whom a notice is served under subsection (4) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the place, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent a recurrence of the offence.

(6) For purposes of this section "place" includes any place, whether or not
  (a) it is covered or enclosed,
  (b) it is used permanently or temporarily, or
  (c) any person has an exclusive right of user with respect to it.

2. Repeal definition of "common bawdy house" in section 179(1) of the Criminal Code.

3. Repeal clauses (a) and (d) of section 180(1) of the Criminal Code.

Recommendation 62

1. Amend section 155 and 157 of the Code, so that they no longer extend to consensual acts between those of 18 years or older.

2. Repeal section 158 of the Criminal Code.

Recommendation 63

In view of the uncertainty which surrounds the meaning and purpose of section 175 of the Criminal Code, and the confusion over the relationship between the nuisance provisions in the Code and the power of an Attorney General of a province to seek a civil injunction to restrain a common nuisance, the federal Minister of Justice and his provincial counterparts should, if necessary, make a reference of this issue to the Supreme Court of Canada, or seek a legislative solution to the problem.

Recommendation 64

Repeal section 253 of the Criminal Code.

Recommendation 65

Canada should review its position on its failure to become a party to the 1951 United Nations Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others and its low profile international stance on prostitution and how to deal with it, in general; in particular, if it takes issue with some of the prescriptions of the Convention, or future resolutions of international bodies on prostitution, then it should be on grounds of principle rather than expediency.

Chapter 50

Recommendations on Children

1. The Present Law

Recommendation 66

Provincial child welfare authorities are encouraged to review their response to child sexual abuse, as recommended by the Committee on Sexual Offences on Children and Youths (at pp. 548-549). We recommend that the issue of children's involvement in the production of pornography should be on the agenda of any such review. However, we caution that not every child involved in the production of pornography may be a neglected child within the philosophy of child welfare legislation. Accordingly, we recommend that a balance be struck between recognizing the autonomy and capacity of the family to deal with exploitation of its own children and the provision of state assistance where that is needed.

Recommendation 67

We recommend the enactment of criminal sanctions for the production, dissemination, and possession of "child pornography".

Recommendation 68

Provincial and municipal authorities should continue their efforts to control the access of young people to offensive material by means of film and video classification systems and municipal by-laws regulating access to adult material.

2. International Obligations and Instruments

Recommendation 69

Canada should ratify the 1959 Declaration of the Rights of the Child.

3. Legal Recommendations

Recommendation 70

All of the reforms to the criminal law and related statutes dealing with pornography and prostitution involving children and youths should be applicable to persons under 18 years of age.

Recommendation 71

Trials of persons under 18, accused of any of the offences proposed in our recommendations should be conducted in accordance with the Young Offenders Act. Accordingly, if the minimum age of 18 as provided in that Act is not fully implemented across Canada by the time these recommendations are in effect, no person under 18, who is not given the protection of the Young Offenders Act, should be charged.

Recommendation 72

Pursuant to recommendation 2 in this Part, the following new section of the Criminal Code should be enacted:

(1) Everyone who:

(a) Uses, or who induces, incites, coerces, or agrees to use a person under 18 years of age to

(i) participate in any explicit sexual conduct for the purpose of producing, by any means, a visual representation of such conduct;

(ii) participate in any explicit sexual conduct in the context of a live show;

(b) induces, incites, or coerces another person to use a person under 18 years of age to

(i) participate in any explicit sexual conduct for the purposes of producing, by any means, a visual representation of such conduct;

(ii) participate in any explicit sexual conduct in the context of a live show;

(c) participates in the production of a visual representation of or a live performance by a person under 18 years of age participating in explicit sexual conduct;

(d) makes, prints, reproduces, publishes or distributes, or has in his possession for the purposes of publication or distribution, a visual representation of a person under 18 years of age participating in explicit sexual conduct

is guilty of an indictable offence and is liable to imprisonment for 10 years.

(2) For the purpose of subsection (1)

(a) a person who at any material time appears to be under 18 years of age shall in the absence of evidence to the contrary, be deemed to be under 18 years of age.

(3) Everyone who sells, rents, offers to sell or rent, receives for sale or rent, exposes to public view, or has in his possession for the purpose of sale or rent a visual representation of a person under 18 years of age participating in explicit sexual conduct, is guilty

(i) of an indictable offence and is liable to imprisonment for 5 years, or

(ii) of an offence punishable on summary conviction and is liable to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for six months or to both.

(4) Every one who knowingly, without lawful justification or excuse, has in his or her possession a visual representation of a person under 18 years of age participating in explicit sexual conduct, is guilty of an offence punishable on summary conviction, and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(5) For the purposes of subsections (1), (3) and (4) above,

(a) "explicit sexual conduct" includes any conduct in which vaginal, oral or anal intercourse, bestiality, masturbation, sexually violent behavior, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals is depicted;

(b) "sexually violent behavior" includes
  (i) sexual assault, and
  (ii) physical harm, including murder, assault or bondage of another person or persons, or self-infliction of physical harm, carried out for the apparent purpose of causing sexual gratification or stimulation to the viewer;

(c) "visual representation" includes any representation that can be seen by any means, whether or not it involves the use of any special apparatus.

Recommendation 73

Paragraph 647(b) of the Criminal Code should be amended to provide a higher maximum penalty for a corporation convicted of a summary conviction offence; or the section should provide, as does subsection 722(1), that a higher penalty may be provided with respect to a particular offence.

Recommendation 74

Section 168 of the Criminal Code should be repealed.

Recommendation 75

A new section of the Criminal Code should be enacted to deal with production, dissemination and possession of material advocating, encouraging or presenting as normal the sexual abuse of children in the following form:

(1) Everyone who makes, prints, reproduces, publishes, or distributes, or has in his possession for the purposes of publication or distribution material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for 10 years.

(2) It shall not be a defence to a charge under subsection (1) that the accused was ignorant of the character of the material, matter, thing or production.

(3) Everyone who sells, rents, offers to sell or rent, receives for sale or rent, exposes to public view, or has in his possession for purpose of sale or rent material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty
  (i) of an indictable offence and liable to imprisonment for 5 years, or
  (ii) of an offence punishable on summary conviction and liable to a fine of not less than $1,000 and not more than $5,000 or to imprisonment for six months or to both.

(4) Everyone who knowingly, without lawful justification or excuse, has in his or her possession material which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of a summary conviction offence and is liable to a fine of not less than $500 and not more than $2,000 or to imprisonment for six months or to both.

(5) For purposes of this section "material" includes any written, visual or recorded matter.

(6) For purposes of this section "sexual abuse" means any sexual activity or conduct directed against a person under 18 years of age which is prohibited by the Criminal Code.

Recommendation 76

Section 163 of the Criminal Code should be repealed and replaced by a new section which would include provisions dealing specifically with the presentation of a live show advocating, encouraging, condoning, or presenting as normal the sexual abuse of children, in the following form:

(1) Everyone who, being the owner, operator, lessee, manager, agent or person in charge of a theatre or any other place in which live shows are presented, presents or gives or allows to be presented or given therein a performance which advocates, encourages, condones or presents as normal the sexual abuse of children is guilty of an indictable offence and liable to imprisonment for 10 years.

Recommendation 77

Section 164 of the Criminal Code should be repealed and a section enacted which includes provisions dealing explicitly with use of the mails to transmit material involving children or advocating the sexual abuse of children, along the following lines:

(1) Everyone who makes use of the mails for the purpose of transmitting or delivering any material which:

(a) depicts a person or persons under the age of 18 years engaging in explicit sexual conduct,

(b) advocates, encourages, condones, or presents as normal the sexual abuse of children,

is guilty of an indictable offence and liable to imprisonment for 10 years.

Recommendation 78

A new section should be included in the Criminal Code, to control display of visual pornographic material to persons under 18 years of age, in the following form:

(1) Everyone who

(a) sells, rents or offers to sell or rent visual pornographic material to anyone under 18 years of age; or

(b) displays for sale or rent visual pornographic material in such a manner that it is accessible to and can be seen or examined by anyone under 18 years of age; or

(c) being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein to anyone under 18 years of age any visual pornographic material

is guilty of a summary conviction offence and is liable to a fine not to exceed $1000 or to imprisonment for 6 months or to both.

(2) No one shall be convicted of an offence under subsection (1) who can demonstrate that

(a) he used due care and diligence to ensure that there was no such visual pornographic material in the materials which he sold or rented, offered for sale or rent, displayed for sale or rent, or presented, gave or allowed to be presented or given; or

(b) the visual pornographic material has a genuine educational or scientific purpose and was sold or rented, offered for sale or rent, or displayed for sale or rent, presented, given, or allowed to be presented or given, for that purpose; or

(c) according to the classification or rating established for film or videotape material in the province or territory in which it is sold, rented, offered for sale or rent, displayed for sale or rent, presented, given or allowed to be presented or given, the film or videotape has been classified or rated as acceptable for viewing by those under the age of 18 years.

(3) For purposes of this section, "visual pornographic material" includes any matter or thing or live performances in which is depicted or described vaginal, oral or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals, but does not include any material prohibited by [offences involving portrayals of children and sexually violent or degrading material].

Recommendation 79

Subsections 159(2)(b), (c) and (d) of the Code should be repealed and replaced by a provision specifically directed at selling or displaying sex aids to a person under 18 years of age, in the following form:

(1) Everyone who

(a) sells or offers to sell a sex aid to anyone under 18 years;

(b) displays for sale sex aids in such a manner that they are accessible to and can be seen or examined by anyone under 18 years of age,

is guilty of a summary conviction offence and is liable to a fine not to exceed $1000 or to imprisonment for 6 months or to both.

(2) For the purposes of subsection (1) "sex aid" includes any device, apparatus or object designed solely to stimulate sexually the user of it.

Recommendation 80

The following definitions should apply to the sections of the Code dealing with pornographic offences:

"sexually violent behaviour" includes

(i) sexual assault,

(ii) physical harm depicted for the apparent purpose of causing sexual gratification or stimulation to the viewer, including murder, assault or bondage of another person or persons, or self-infliction of physical harm.

"visual pornographic material" includes any matter or thing or live performances in which is depicted or described vaginal, oral, or anal intercourse, masturbation, lewd touching of the breasts or the genital parts of the body, or the lewd exhibition of the genitals.

Recommendation 81

The Evidence Acts of Canada, the provinces and the territories should be amended to provide that every child is competent to testify in court and the child's evidence is admissible; the weight of the evidence should be determined by the trier of fact.

Recommendation 82

There should be no statutory requirement for corroboration of "unsworn" child's evidence; this would entail repeal of section 586 of the Criminal Code, section 16(2) of the Canada Evidence Act and section 61(2) of the Young Offenders Act, and corresponding sections of provincial Evidence Acts.

Recommendation 83

No alteration be made to the Evidence Acts of Canada or the provinces and territories to permit reception by a court of hearsay evidence of a child's account of the commission against him or her of a sexual offence.

Recommendation 84

Subsection 442(1) of the Criminal Code should be amended to allow the court to exclude any person from the courtroom where any evidence or information presented to the court would be seriously injurious or seriously prejudicial to the complainant or witness who is under 18.

Recommendation 85

As much publicity as possible should be given to the name of an accused who is convicted of an offence involving the child pornography or child prostitution offences we propose, and the sexual offences in the Code, with the exception of the name of a person convicted of incest.

Recommendation 86

Subsection 442(3) of the Criminal Code should be amended to provide for the complainant and witness under 18 years of age the same mandatory protection from publication of name or identifying information as is now extended to youthful witnesses and complainants in trials of young offenders by section 38 of the Young Offenders Act.

Recommendation 87

Subsection 442(3) of the Criminal Code should be amended so as to make it clear that section 442(3) applies to the offences recommended by this committee.

Recommendation 88

A person accused of the offence of selling pornography containing sexually explicit portrayals of children, or of selling pornography advocating the sexual abuse of children, should be entitled to defend the charge on the basis that he had used due diligence to inspect the materials.

Recommendation 89

The Criminal Code should be amended to add a provision that:

> In any proceedings in which a person is convicted of producing, distributing or selling pornographic material the court shall order the offending material or matter or thing or copies thereof forfeited to Her Majesty in the Right of the Province in which proceedings took place, for disposal as the Attorney General may direct.

Recommendation 90

A section should be added to the Criminal Code to provide for criminal liability of officers and directors, along these lines:

Where an offence under this act committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Recommendation 91

Sections 166 and section 195(1)(a) to (i) of the Criminal Code should be repealed and replaced with a new prohibition on procuring, which would deal specifically with the procuring of those under 18. That section is:

(1) Everyone who

(a) by force, by threat of force or by other coercive or threatening behaviour induces a person of 18 years or older to engage in prostitution with another person or generally, or

(b) by force, by threat of force or by other coercive or threatening behaviour compels a person of 18 years or older to continue engaging in prostitution with another person or generally

is guilty of an indictable offence and liable to imprisonment for 14 years.

(2) Everyone who

(a) persuades, coerces or deceives a person under 18 years of age in order to induce that person to engage in sexual activity for money, or for any other consideration or reward, or in illicit sexual conduct with another person or generally, or

(b) encourages, coerces or deceives a person under 18 years of age in order to induce that person to continue to engage in sexual activity for money, or for any other consideration or reward, or in illicit sexual conduct with another person or generally,

is guilty of an indictable offence and liable to imprisonment for 14 years.

(3) For the purposes of subsection (2), "illicit sexual conduct" means any sexual behaviour or act which is prohibited by the Criminal Code, whether or not such prohibition is based upon the age of the parties to the act or of any one of them.

Recommendation 92

The age specified in section 157 of the Criminal Code should be lowered to 18 from 21, so that the prohibition against buggery in section 155 of the Code and against an act of gross indecency in section 156 will not apply to acts committed in private between persons who are 18 or over.

Recommendation 93

Sections 146, 151, 152, and 153 of the Criminal Code should be amended in order to provide that the protection against sexual assault extended thereby to females is also available to males.

Recommendation 94

In offences involving sexual assault on young persons, the requirement that the victim be of "previously chaste character" should be removed from the Criminal Code.

Recommendation 95

The offences involving young persons set out in Part IV of the Code should be reviewed with the aim of rationalizing them by repealing outmoded sections.

Recommendation 96

Section 167 of the Criminal Code should be repealed.

Recommendation 97

Section 195(1)(j) of the Criminal Code be repealed and replaced with a new prohibition against receiving financial support from prostitution, which would contain provisions dealing specifically with receiving support from the prostitution of those under 18. The section is:

> (1) Everyone who by force, threat of force or other coercive or threatening behaviour induces a person of 18 years or older to support him or her financially in whole or in part by acts of prostitution is guilty of an indictable offence and liable to imprisonment for 14 years.
>
> (2) Everyone who is supported financially in whole or in part by a person under 18 years of age from the proceeds of sexual activities by that young person for money or for other consideration or reward is guilty of an indictable offence and liable to imprisonnement for 14 years.
>
> (3) For purposes of subsection (2), evidence that a person lives with a person or persons under the age of 18 who engage in sexual activity for money or for other consideration or reward is, in the absence of evidence to the contrary, proof that that person is supported, in whole or in part, from the proceeds of that activity.

Recommendation 98

No person under 18 should be permitted to be employed in any prostitution establishment which might be set up pursuant to the exception for provincially regulated establishments provided in our proposal about prostitution establishments.

Recommendation 99

The following new section should be added to the Criminal Code:

> (1) Everyone who engages in, or attempts or offers to engage in sexual activity for money or for other consideration or reward with a person under 18 years of age is guilty of an indictable offence and liable to imprisonment for five years.
>
> (2) It is no defence to a charge under this section that the accused believed the other person to be 18 years or older.

Recommendation 100

A young person who engages in sexual activity for reward as the provider of sexual services should not be subject to a criminal penalty.

Recommendation 101

Persons under 18 who are using the streets and commit any of the nuisances prohibited in our proposed section 171 of the Criminal Code should be prosecuted in accordance with that section.

Recommendation 102

Federal, provincial and territorial governments should reaffirm their commitment to providing an environment where all children have the opportunity to develop to the fullest extent, their intellectual, physical and spiritual attributes. To this end, the Secretariat proposed in this Report should give high priority to issues affecting children and young people.

Recommendation 103

The federal goverment should collaborate with and assist the provinces, territories and private organizations and agencies in the development of educational programs for children, and those with special responsibilities for the welfare of children, in the areas of family life, human sexuality and media literacy.

Recommendation 104

Provincial and territorial governments should give high priority to programs in family life, human sexuality and media literacy at all levels within the school system.

Recommendation 105

The federal government should collaborate with and assist the provinces, territories, and private organizations and agencies in assessing the effectiveness of social service programs designed to assist children and young people, in developing new programs and in implementing changes designed to better meet the needs and current realities of young people in the 1980's and 1990's.

Chapter 51

General Recommendations

There are a number of recommendations in this Part which also appear in other Parts of this Report. They are repeated here because they are of a general nature and are applicable to the areas of pornography and prostitution involving both adults and children as addressed in this Report.

Recommendation 50

> The government of Canada in conjunction with the governments of the provinces and territories should strengthen both their moral and financial commitment to removing the economic and social inequalities between men and women and discrimination on the basis of sexual preference.

Recommendation 51

> The government of Canada in conjunction with the governments of the provinces and territories should ensure that there are adequate social programs to assist women and young people in need.

Recommendation 52

> The government of Canada in co-operation with the provinces and territories, should provide financial support for both research into and the implementation of sensitive and relevant educational programs on human sexuality for use in the country's schools; in particular the governments should jointly fund a National Centre and Program in Sexuality and Life Education to bring together the leading scholars and clinicians in the field to conduct research and formulate program and pedagogical models.

1. Education

There was recognition throughout the public hearings that pornography is just one part of our entire communications media. While it was argued that pornography is often the most extreme material with respect to its depiction of dehumanized sex and sexual violence, it shares many common elements with other media content. What starts as sex-role stereotyping in much of the mainline content, ends as obscene violence and degradation. Pornography, therefore, cannot be separated from other aspects of our communications industry and dealt with in complete isolation. Nor can we expect that legal remedies alone will be successful in dealing with such a complex issue.

The Toronto Task Force on Public Violence Against Women and Children expressed this common view:

> Law reform will not eliminate pornography from our society. Neither will the disappearance of pornography eliminate the problems that pornography has caused. The problems in our society and the violence to which women and children are subjected go far beyond imagery. People's attitudes must change and in the long run this will only evolve through positive depictions in all forms of the media.

The views on why pornography will not be adequately addressed through legal channels alone are summarized very succinctly in the following statement:

> For centuries, perhaps always in civilization as we know it, this inequality, this power imbalance has existed. As many pornographers rightly point out, pornography has long been with us; as they neatly omit, so has sexual inequality, sexism and misogyny ... pornography mirrors and celebrates this inequality.
> New Brunswick Advisory Council Status of Women

Such a view suggests, of course, that pornography is not just an issue relating to the mass media, but that its roots are deep within our society. Long term solutions to the display of dehumanized sexual activities will, therefore, require sustained efforts towards achieving greater equality of opportunity for all people in society, and an new consciousness on the part of Canadians about the detrimental impact of sex-role stereotyping and the role the media plays in maintaining inequalities between women and men.

Arguments such as these, led many organizations appearing before the Committee to call for wide ranging educational and informational programs to be addressed to the public in general, and to specific groups such as parents, teachers, judges, police and social workers, and other professionals who work with children or young people. The objectives of such programs would be to increase public understanding about human sexual relations and the ways in which the media, and pornography in particular, present distorted images of human behaviour. Related to such a program is the aim of encouraging positive media images of women and men and a corresponding elimination of the traditional sex-role stereotyping which is still all too common in programming.

While acknowledging that the magnitude of such public education programs would require the leadership (and financial support) of federal government departments such as Health and Welfare Canada and the Department of Communications, many briefs stressed the importance of government funding to encourage the participation of community groups, many of which are already providing sex education and information on sex role stereotyping, usually on a shoe-string budget or a voluntary basis.

One of these groups, the Vancouver Status of Women, strongly urged that financial support be provided to existing groups which are: doing research and public educational work in the area of pornography; providing adults and teenagers with accurate and positive information regarding sex, including birth control and health matters (Planned Parenthood, for example); doing research and public educational work in the area of female sexuality; and producing alternative media imagery which engages in an exploration of sexuality and sexual issues from a woman's point of view.

They also recommended that financial support be provided for research and implementation of projects aimed at counteracting the persistent media acceptance and legitimization of violent behaviour towards women, with the goal of prevention of violent and sexual crimes against women and girls.

A similar point was made by the the Anglican Church of Canada, Diocese of New Westminster, which urged that funds be directed to such groups as Media Watch and Status of Women groups to monitor and control stereotyping of women in the media.

Other groups urged that the Federal Government reinstate funding that had been cut from existing programs:

> [The] Federal Government [should] take serious consideration of the recent cutbacks to federal programs re: sexuality and family planning education and health services and ... this funding [should] be markedly increased. Further ... the federal government [should] develop a strong policy statement in favour of sexuality and family planning education and health services and [should] set financial policy which will encourage every province to support these areas, both through policy and through financial assistance ....
> Planned Parenthood of Nova Scotia, Halifax

It was also suggested to the Committee that the support and funding of Women's Studies Programs in educational institutions should be recognized as a fundamental necessity in creating broader educational awareness of the questions of issues and sexuality.

Many organizations believed that an inextricable part of the public education program should be a campaign to combat the sex-role stereotyping of women in the news media. Media Watch, Vancouver, a national women's organization dedicated to improving the portrayal of women and girls in the media, has taken the lead on this issue. Its objective is to eliminate sexist and pornographic images and to encourage the creation of images that reflect the changing and diverse roles of women in Canadian society.

> Media Watch defines sex role stereotyping as:
>
> failure to represent women in their full variety of ages, shapes, sizes and colours;
>
> failure to reflect the increasing diversity of women's lives;
>
> failure to portray a representative range of the occupations that women hold;
>
> invisibility of women in discussion of many issues;
>
> portrayal of women as sexual lures and decorative objects;

invisibility of female experts and decision makers;

language which assumes that everyone is male unless identified otherwise.

Media Watch considers sex-role stereotyping to be harmful to women because it dehumanizes, misrepresents and degrades them. The extreme form of this distortion is, of course, pornography.

Media Watch, Calgary, in its presentation to the Committee, described the stereotyped portrayal of women in the media.

> Media images reflect and magnify the prevalent ways that our culture defines women, and illustrates how limiting and offensive these stereotypes are ... In the media men are identified by occupations in the public sphere. Women are shown performing household and child care tasks and this work is constantly trivialized ... They have to be perfect mothers, perfect wives, perfect employees, and perfect bed partners. In short, women are defined by their relationship to men, they are not shown to have a legitimate identity that is separate from men ....
>
> In the media women are rarely portrayed as gainfully employed. Their contribution to the work world is either systematically ignored or distorted ... their value is judged according to their ability to perform a given task ... it doesn't matter what the woman's occupation is, she is supposed to be occupied by a continual concern about whether or not her body is beautiful or sexually attractive enough ....
>
> Media Watch considers that sex role stereotyping of woman creates an environment that encourages the dehumanization, misrepresentation and degradation of women. The extreme form of this attitude is pornography. Presently our environment is polluted with messages that tell us women are powerless, feebleminded, submissive, victims, and only valuable if they are young, beautiful and white ....
>
> Male dominance and female submissiveness are at the very heart of the stereotype of men and women. Pornography is the extreme portrayal of dominance-submissiveness, the objectification and the abuse of women. Media Watch views sex role stereotyping and pornography as a continuum which must be uprooted from our culture.
> Media Watch, Calgary

In order to reduce or eliminate sex-role stereotyping and pornography from the news media, several national organizations, among them the Canadian Teachers' Federation, the Canadian Coalition Against Media Pornography, Media Watch, and the Canadian Congress for Learning Opportunities for Women, proposed that guidelines on sex-role stereotyping and pornography should be established for the CRTC, The Canadian Film Development Corporation, the Department of Communications, the Canada Council and all other government-funded communications and cultural agencies.

The Committee found many of the suggestions made at the public hearings compelling and persuasive. As will have been apparent throughout our Report, we do not believe that legal action alone can deal with the disturbing and pervasive nature of many aspects of the media and of pornography in particular. Most clearly, of course, legal remedies cannot address the lack of understanding about human behaviour and specifically human sexual relations which appear to lead some people into believing that media and pornographic representations are truthful and accurate depictions of people. Accordingly, the Committee is making a series of recommendations about public educational programs.

Recommendation 106

The federal government in conjunction with the provincial governments should initiate and supporto public education programs designed too

(a) increase the general understanding of human sexual relations;

(b) promote a fuller appreciation of the impact of the mass media in creating or maintaining beliefs and attitudes about human behaviour.

In implementing such programs, the governments should fund and assist the work already being carried out by numerous voluntary, community or religious organizations.

Recommendation 107

The federal government should ensure that all its departments and agencies which have responsibility for research, culture and communications, e.g., the CRTC, the Canadian Film Development Corporation, the Canada Council, the Social Sciences and Humanities Research Council, the Department of Communications, develop guidelines designed to reduce or eliminate sex-role stereotyping in the programs or work for which each is responsible.

Chapter 52

Implementation of Recommendations

Recommendation 108

(1) A Secretariat should be set up under the aegis of the federal Departments of Justice, of the Solicitor General and of Health and Welfare:
  - **(a) To stimulate and co-ordinate efforts at the federal level to deal with pornography and prostitution as social phenomena;**
  - **(b) To stimulate discussions and co-operation with the governments of the provinces and territories, and with social, education and charitable organizations in the private sector, on ways and means of dealing with these two problems;**
  - **(c) To monitor and inform public opinion and seek public input on these two problems.**

(2) The Secretariat should as priorities:
  - **(a) Canvass all levels of government to determine what social and educational programs relating to the problems surrounding pornography and prostitution are presently in place;**
  - **(b) Establish federal-provincial task forces on various elements of the social problems associated with pornography and prostitution to develop working papers on those problems and approaches to them.**

We have made a number of recommendations which will require effective and co-ordinated effort by all levels of government to ensure their implementation.

Our recommendations are directed to a wide variety of government departments and their agencies which have a coincidental interest in both the causes and effects of pornography and prostitution. There is currently such a diffusion of interest and effort that one of our tasks has been simply to identify who is involved and in what role.

A number of federal government departments are concerned with the social, legal and remedial aspects of both problems. The Department of Justice and the Ministry of the Solicitor General share the principal responsibility for the enactment and enforcement of laws. The Departments of National Revenue, Communications and the Ministry responsible for the Canada Post Corporation administer legislation which regulates the flow and distribution of material and electronic communication into and throughout Canada. The regulatory agencies they use include Canada Customs, the Canadian Radio-

Television and Telecommunications Commission, and Canada Post Corporation. The following other federal departments are interested in both the social causes and consequences of pornography and prostitution:

The Department of National Health and Welfare
The Ministry Responsible for the Status of Women
The Department of Employment and Immigration
The Department of Labour
The Department of Youth
The Secretary of State

At various places in this Report we have described both the specific and integrated roles played by these several federal departments and agencies. We have described what we have been able to find out about areas where there has been and continues to be inter- and intra-departmental co-operation. With some exceptions, we have found that the diffusion of interests has led to an almost complete decentralization of response at the federal level.

The departments and agencies of the provinces and their municipalities are also currently involved in the effort to deal with the social phenomena of pornography and prostitution. During our public hearings we were told about various local initiatives taken by both concerned governments and citizens. The programs are so numerous and so disparate that we will not attempt to describe them. Suffice it to say that we found the same decentralization that exists nationally to be present in the provinces and municipalities.

Agencies and organizations in the private sector play an important role in the educational and remedial aspects of the problems associated with pornography and prostitution. It is essential not only that new initiatives in the private sector be encouraged, but also that the development of those private organizations already established, be fostered.

If we are going to have any chance for real progress in dealing with both the causes and effects of pornography and prostitution, it will be because all members of the Canadian community want there to be progress. It will be necessary to include all members of the community in the work that must be done to find solutions. If some members of the community are excluded or are allowed to excuse themselves from the debate, an opportunity will be lost. One way of involving the community is to encourage private foundations, trusts and charities to play a larger role in providing services.

These charitable institutions have already made distinguished contributions to our country. They have undertaken projects and have supplied services and facilities that governments either cannot or will not. Private charitable institutions have a long history of helping children.

It is fine for a committee such as ours to recommend increased government funding for what we are convinced is an urgent cause. But, we can hardly expect that our commitment to these issues soon become the commitment of government. Not because the government is mean or will refuse to listen, but because the public purse is limited and there are many calls on the public list of priorities.

For all of these reasons we are of the view that tax incentives and concessions to those of our private and corporate citizens who may be eager to help fund the kind of effort we recommend will result in more happening and sooner.

There will always, of course, be a primary obligation on all levels of government. It is, of course, to be expected that all those concerned with the problems have so far responded to the acknowledged need for action in a way that reflects their particular interest. Because of the community of interest that exists, however, there has been some sensible sharing of information and effort. Nevertheless, it is apparent that much more can and should be done to strategically plan and co-ordinate efforts by all those who clearly have a stake in both understanding the need for concerted action and in designing programs and initiatives.

Canadians are clearly expecting as much. Many of the hundreds of people who came to the Committee's public discussions, expressed an animated urgency about both these subjects. They wanted better co-operation within government, better organization of effort and better execution and results. There were the inevitable, although genuine, complaints about lack of funding and misdirected government priorities, but what is more important, they complained about hesitation and inertia in both law enforcement and remedial treatment, two areas where governments have the principal roles to play. These complaints were usually accompanied by the suggestion that the purpose of government needs to be better understood and that the efforts of the various departments could be much better co-ordinated.

How can these complaints, concerns, and suggestions be translated into accomplishment?

First and most obvious is the requirement that there be actual consultation between governments. That may seem a benign suggestion, but the fact is that there has not been much consultation so far in these areas. It may be true that Canadians have an almost unparalleled belief in the consultative process. If that is so, it is because we have learned to talk and to listen to one another. That is how we have tried to manage both the duality and plurality of this country, and it is the only way that we have been able to make sure that our regional and cultural diversity helps to unite the country rather than divide it. Increased formal consultation about pornography and prostitution clearly must take place, early and often.

Talking and listening are only a prelude to effective ultimate action. While there is a continuing need for decentralized effort, there must be some better centralization of planning and purpose. We think, therefore, that a Secretariat should be established to ensure that urgent steps are taken to consider and to co-ordinate the various interests involved.

In our view, the Secretariat should be established under the joint aegis of the federal Departments of Justice, the Solicitor General and Health and Welfare. While the Secretariat should report to these three sponsoring departments, we think that it should include representatives from other relevant federal and provincial governments and agencies, as well as interested members of the public. Such broad membership is necessary not just to ensure that all interests are represented, but also to make sure that there is a broad base of both support and response.

We expect that separate task forces would have to be created to deal with particular aspects of the Secretariat's work. Some examples of the wide variety of activity to be undertaken are services for young people, co-ordinated investigation techniques, and education and employment opportunities for those wanting to join the work force.

The Secretariat could quickly begin its work by canvassing all levels of government to determine what relevant programs are presently in place where information and experience either is being or could usefully be shared. The Secretariat could then determine its priorities for the first two years of its operation and ensure that those priorities are published and understood across the country.

We would hope that by publishing annual reports, the Secretariat could maintain contact with the public and promote response. We also think that from time to time, the Secretariat would benefit from public participation at well structured symposia where its work and continuing priorities could be reviewed and critically assessed.

It is our hope that the Secretariat will be a co-ordinating vehicle accountable for specific programs, rather than the random arrangements that now exist. Canadians are anxious to have not only a better understanding of what problems we face and why, but also to know that something is actually being done to achieve tangible progress.

Recommendation 102

Federal, provincial and territorial governments should reaffirm their commitment to providing an environment where all children have the opportunity to develop to the fullest extent, their intellectual, physical and spiritual attributes. To this end, the Secretariat proposed in this Report should give high priority to issues affecting children and young people.

Recommendation 103

The federal government should collaborate with and assist the provinces, territories and private organizations and agencies in the development of educational programs for children, and those with special responsibilities for the welfare of children, in the areas of family life, human sexuality and media literacy.

Recommendation 104

Provincial and territorial governments should give high priority to programs in family life, human sexuality and media literacy at all levels within the school system.

Recommendation 105

The federal government should collaborate with and assist the provinces, territories, and private organizations and agencies in assessing the effectiveness of social service programs designed to assist children and young people, in developing new programs and in implementing changes designed to better meet the needs and current realities of young people in the 1980's and 1990's.

Appendix

The Committee received submissions both at the public hearings and by mail. The following is a list of those groups and individuals who submitted briefs. The list is presented in the order in which the public hearings were held. Non-appearing submissions are listed in accordance with their place of origin and are shown below the names of those who made presentations at the hearings.

Many other people sent letters to the Committee. We are not able to acknowledge all of those correspondents here, and can only thank them as a group for their interest.

APPENDIX

EDMONTON, ALBERTA

January 9, 1984

Presentation by:

Every Woman's Place	Christine Kulyk
The Ukranian Catholic Women's League of Canada (Edmonton Eparchy)	Catharine Chickak Adlynn Hewitt, Q.C.
University Women's Club of Edmonton	Tammy Irwin
Herbert Presley Mark Pickup	
Across-Canada	Shirley Krause
Ross Olsen	
Ukranian Women's Association of Canada	Helen Raycheba
Dave Billington (The Edmonton Sun)	
The Ecumenical Women's Group of Edmonton	Jean Armstrong
City Centre Association	Maury G. Van Vliet, Chairman
Roy Piepenburg	
Concerned Citizens on Pornography and Prostitution	Manfred Lucat
Alberta Human Rights Assoc.	Allan Welsh
Pornography Action Committee	Tina Rogers Chairperson

Edmonton Local Council of Women	Olga Cylurik, President
Mair Smith, "Violent Response to a Violent Issue", Webspinner, December, 1983	
Alberta MacKenzie Council of the Catholic Women's League of Canada	Rose-Marie McCarthy
Alberta Federation of Women United for Families	Jean Takahashi Joanne Lewicky Kathleen Higgins
Il Nuovo Mondo	Janak Advani, Editor
Women's Section, Alberta NDP	Starr Curry Terry Hatrichuk
Alliance Against Sexual Harassment	Mary Hickmore

Non-Appearing Submissions:

Alberta Women's Institutes	Kay Rowbottom, President Aileen Kritzinger Beryl Ballhorn Olive Meyer
Alberta Association of Registered Nurses	Beverly Anderson Arnette Anderson Jeanette Boman Joyce Relyea An Ad Hoc Committee of the A.A.R.N. Provincial Council
Laurence Decore, Mayor	Supported by: City of Edmonton Police Local Board of Health Edmonton Social Services Edmonton Public Library Edmonton Separate School Board Edmonton Public School Board
Don Burdego President, Board of Directors Boys' and Girls' Clubs of Edmonton	
Edmonton Women's Shelter Ltd.	Mary F. Weir, President
La Fédération des femmes canadiennes-françaises	Églande Mercier President

Edmonton Federation of Community Leagues	Arlene Meldrum, Chairman Ad Hoc Committee

CALGARY, ALBERTA

January 9, 1984

Presentation by:

Calgary Police Commission	Brian E. Scott, Chairman Inspector Frank Mitchell Staff Sergeant Boiteau
Calgary Media Watch	Dr. Maria Ericksen
Calgary Y.W.C.A.	Felicia Melnyk Pat Cooper Janice Sich-Thompson Prof. Kathleen Mahoney Lee Kasdorf
J.W.S. Smyth	Private Citizen (former member of R.C.M.P.)
Brothers & Sisters in Christ	Bart Craig
Calgary Status of Women	Lynne Fraser Cheryl Kehoe
Darwin Cronkhite	
Dr. John Heintz	Philosophy Department University of Calgary

CALGARY, ALBERTA

January 10, 1984

Presentation by:

Calgary Local Council of Women	Dorothy Groves Donalda Vine
Fred Wagner "Your Choice" Video Service	
Kathleen Gilbert	
Susan Morgan	

Deborah Carnat	
University Women's Club of Calgary	Lois Cummings Janice Hecht
Gordie Lagore Calgary Christian Centre	
Calgary Free Presbyterian Church	Thomas Tice — Minister Darrell Urushi
Henry Nielsen	
Calgary Evangelical Ministerial Association	Rev. Alan Dunbar
Annette Lengyel	
Darrell Uruski	
Gary Duffy	

Non-Appearing Submissions

Hugh Jones	
Council for the Family	Ardis Beaudry
Laura Henkel	
Family Resource Centre of the Roman Catholic Diocese of Calgary	

VANCOUVER, BRITISH COLUMBIA

January 11, 1984

Presentation by:

Rental Housing Council of B.C.	J.L. Hayes, Executive Director
City of Vancouver — Submission by Alderman May Brown	May Brown Terry Bland, City Solicitor
The West End Seniors' Network	Catherine B. Jensen
St. Andrew's - Wesley Church	Bob Shank, Senior Minister George Balfour, Board Chairman
Vancouver Archdiocesan Council Catholic Women's League	Rose Kamm

W.E.D.N.E.S.D.A.Y. (West End Dedicated Neighbours Emphasizing Solutions Designed Around You)	Howard Faulkner
Vancouver Multicultural Women's Association	Deletia Crump Mary Lakes
Chris J. Garside	
Pat Carney, M.P.	Donna MacKie, President Vancouver Centre Riding Association
C.R.O.W.E. (Concerned Residents of the West End)	Gerry Stafford Davis & Company Elliott Myers Glen Tynan Howard La Favor Heinz Brett Barbara Brett
West End Community	Gordon Price
Gordon Neighbourhood House	Richard P. Morley

VANCOUVER, BRITISH COLUMBIA

January 12, 1984

Presentation by:

British Columbia Hotels' Association	Virginia Engel Boughton & Co., Barristers
Group of Concerned Social Workers	David Butcher
Cecilia von Dehn	Private Citizen
Eleanor Hadley	Private Citizen
N.D.P. Women's Rights Committee	Joan Smallwood, Chairman Margaret Birrell
Women Against Pornography (Victoria)	Jan Boudelier Teresa Sankey Pam Blackstone
B.C. Civil Liberties Association	Dr. Alister Brown Dr. David Copp Non-written brief

First United Church	Barry Morris Linda Irvin Alan Alvare Leslie Black
Sam Campbell	Street Worker
Nancy Morrison (Lawyer)	
Hospital Employees Union, St. Paul's Unit	Raimo Hietakangas Marie Hietakangas
West End Community Advisory Council	Peter Westlake Carole McIntyre
West End Traffic Committee	Carole Walker
Terrence Bland, Vancouver Corporation Counsel	

Non-Appearing Submissions:

Mary Lakes

Raymond Lee

B.C. Conference of the
United Church of Canada

VANCOUVER, BRITISH COLUMBIA

January 13, 1984

Presentation by:

West End Tenants' Association	Greg Richmond, Project Director Anna Snelling, Treasurer
Tom Vikander	
Amelia Alvarez	
Nancy Tillson	
Georgia Hotel	Lee Cusak, General Manager
Vancouver Status of Women	Lorri Rudland, Researcher

Group of Clergy	Rev. Jeremy Bell Endorsed by: — 7 Signatures of Concerned Individuals
Frederick Gilbertson Content Co-ordinator of "Angles" Magazine	
Nona Thompson Founder of "Step Up" School	
Arleigh Haynes	
R. Burda	
Vic Redmond	
Vancouver Council of Women	Margaret Piggot
Larry Splanna	
Rick Smith	
Harry Rankin	Vancouver Alderman; former head, L.S.B.S.

Non-Appearing Submissions:

Brig Anderson and Concerned Women	
Alliance for the Safety of Prostitutes (A.S.P.)	Marie Arrington Sally de Quadros

TORONTO, ONTARIO

February 6, 1984

Presentation by:

Mayor Art Eggleton City of Toronto	Mary Lunch, Executive Director Patricia McCarney Research Associate
Roman Catholic Archdiocese of Toronto	Dr. Suzanne Scorsone, Office of Catholic Family Life
Glad Day Bookshop	Paul Jenkins and Jerald Moldenhauer
Canadians for Decency	Nancy Pollock

Canadian Organization for the Rights of Prostitutes (Toronto Chapter)	Peggy Miller
National Action Committee on the Status of Women	Doris Anderson Kathy Coffin Jillian Riddington
Libertarian Party of Canada	Paul Vesa
The Pentecostal Assemblies of Canada	Rev. Hudson T. Hilsden On behalf of: —Members and adherents 155,000 in 970 local congregations and Pentecostal Assemblies of Canada with additional 30,000 members and adherents in 160 churches
David Crombie, M.P.	
P.O.I.N.T. (People and Organizations in North Toronto)	Freda Finlay Marion Langford Roberta McFadden Members: Ann Barrett Marilyn Cullum Anne Gordon Mandy Macrae Roberta McFadden A. Cecila Pope
Toronto Area Caucus of Women and the Law	Reva Landau Stephanie Holbik Marla S. Kelhorne Mary Lou Fassel
Esther Harshaw with 176 Supporting Signatures	Esther Harshaw, Trustee Ward 10, Toronto Board of Education Co-Sponsored by: North Rosedale Ratepayers' Association Rosedale United Church with support and co-operation of other local concerned groups

Non-Appearing Submissions:

P. van Lammers, Chairman
Advocacy Committee, Ontario Association of Family Service Agencies

Jean Fenton (Oakville)

Fred Light (Nepean)

John Mascotto (Geraldtown)

James Savage (Kendal)

TORONTO, ONTARIO

February 7, 1984

Presentation by:

Helen Porter

Right to Privacy Committee	George W. Smith
Canadian Federation of University Women, Metro Toronto Clubs	Elizabeth Tugman Shirley Sims Carolyne Keene (Representatives of nine Metro Toronto University Women's Clubs with combined membership of approximately 2,500 women).
United Church of Canada, Division of Mission	Joanne Fairhart Liz McCloy Rev. Peter Wyatt Jean Westney Ruth Evans
Rosedale Church Group and Public Health Nurses Group	Patricia Fenton President, UCW Rosedale United Church Petition of 95 names in support. 11 Public Health Nurses Signatures
Alderman, Ward 6, Jack Layton	
Elizabeth Fry Society of Toronto	Nina Quinn
Metro Toronto Board of Commissioners of Police	N. Jane Pepino Membership: Doris Anderson John Bousfield Inspector Jean Boyd Austin Cooper Trudy Don

	Norm Gardner Jo-anne Grayson Mary Hall Sgt. Jackie Hobbs Burthe Jorgenson Dr. Pat Kincaid Pat Marshall Debbie Parent Judith Ramirez Dr. Gail Robinson Marlaina Sniderman Jan Tennant
Task Force on Public Violence Against Women and Children	Jane Pepino Marilou McPhedran June Rowlands Stephen Watt
Alderman June Rowlands	
Pink Ink	Gary Kinsman
Film and Video Against Censorship Statement	Varda Burstyn
Y.W.C.A. of Metropolitan Toronto	Denise Gardian Francis Hogg —Metro Task Force on Public Violence Against Women and Children —Toronto Area Caucus of Women and the Law —Judy Campbell —Wendy King —Lisa Freedman —Marilou Fassel —Reva Landau —Stephanie Holbick —Linda Patton
Dahn Batchelor, Criminologist	
Carl E. Beigie Ellen G. Shapiro	
The Body Politic	Christine Bearchell, Co-Editor

Non-Appearing Submissions:

Candace Woolley, M.S.W.
Eganville, Ontario

The Ontario Film & Video Appreciation Society	Malcolm Dean
Freedom of Expression Committee	Catharine Wismer, Chairman
Y.W.C.A. of Canada	Vera de Bues
Alan V. Miller	

TORONTO, ONTARIO

February 8, 1984

Presentation by:

Alderman Ann Johnston	Ward 11 — Toronto — "Comments reflecting views expressed to [her] by people who [she] has been elected to represent"
A.C.T.R.A.	Alex Barris, V.P. Paul Siren Arden Ryshpan Colleen Murphy Michael Mercer Ronald Lieberman
Ontario Liberal Party	David R. Peterson, M.P.P. Terry Kirk
Toronto Residents on Street Soliciting (T.R.O.S.S.)	Christopher Bolton Haney Tom Morris L. Castonquay Shirley Krause (spokesperson for Alliance of Concerned Residents on Street Soliciting A.C.R.O.S.S.) —over 80 names of representatives and organizations; and private and public companies
David Scott	Action Group on Media Pornography Canadian Coalition against Violent Entertainment National Coalition on Television Violence
R.E.A.L. Women of Canada	Jean Murphy Gwen Landolt

Susan Cole	
Evangelical Fellowship of Canada	Rev. Brian C. Shiller
The Anglican Diocese of Toronto	Rev. Arthur Brown, Bishop
Girl Guides of Canada	Joan Howell Sheila Crosby
Salvation Army, Toronto	Major Russell Hicks Major Ruth Meakings Major Maxwell Ryan J. Ellery
Seneca College Women's Caucus	Sarah Kelley
B'Nai Brith Women of Canada	Sharron Tenhouse Selma Sage
John Lee Prof. of Scarborough College	

TORONTO, ONTARIO

Non-Appearing Submissions:

Ontario Committee on the Status of Women	Helen Findlay Lee Grills for the Steering Committee
Viking Houses	David M. Aird, M.E.D. Executive Director
Federation of Women Teachers' Associations of Ontario	Representing 31,000 women who teach in Ontario
Mary Brown, Director, Ontario Film Review Board	
Rev. Brad Massman	
Rose Dyson	
St. John's Prayer Group Community, Newmarket	—Endorsed by 16 signatures
Wilma Voortman	
Harold Backer	
Valerie M. Perkins	
Mike van Dyke (Brockville)	
Joan B. Getson (Dryden, Ontario)	

B.L. Lavieille (Willowdale)

Leslie Lawlor
Board of Directors,
Education Wife Assault
Margaret Smith
Barbara Waisberg

Frank G. Sommers, M.D.

The Action Learning Group on Pornography
Jon Arnold
Michael Bach
Adrienne Braitmann
David Hunwicks
Shirley Perry
Sue Wilson

The Board of Directors of Catholic Family Services of Toronto
William Howlett, President

Réseau des femmes du sud de l'Ontario,
Sous-comité sur la violence

Toronto Spokespersons for Committee Against Pornography
Reva Landau
Jean Westney
Denise Gardian

Stephen G. McLaughlin, Commissioner
City of Toronto
Planning & Development Department

The Writers' Union of Canada
Penny Dickens, Executive Director

Additional Ontario Submissions:

Dr. J. Lamont
McMaster University

Council of Christian Reformed Churches in Canada	Rev. A.G. Van Eek

D. L. Valentine

Chris Asseff
Executive Director
Ontario Separate School
Trustees' Association

Diana Cherry

Women of Halton Action Movement
Helen Vaccaro

Prof. T.C. Jarvie
York University

Prof. L. Groake
Philosophy Dept.,
Sir Wilfred Laurier University

John Osborne
Campaign "P"

Tony Matrosous

F. Schultz-Lorentzen

LONDON, ONTARIO

February 9, 1984

Presentation by:

The National Council of Women of Canada	Margaret McGee
Marc Emery, Publisher of London Metro Bulletin	
Clarke Leverette (Librarian and Small Press Publisher)	
The Catholic Women's League of Canada, London Diocesan Council	Muriel Murphy
The Executive of London Conference of the United Church of Canada	Susan Eagle
Robert Metz, President of Freedom Party of Ontario	

Students from the Faculty of Law, University of Western Ontario	Elaine Deluzio Sharyn Langdon Barbara Boake Michele Dodick Susan Sleman (Non-Appearing Co-Authors Jasmine Belis Helen Brooks)
Prof. Constance Backhouse Faculty of Law, University of Western Ontario	
London Status of Women Action Group	Erin Hewitt, M.A. Gail Hutchinson, Ph.D Marion Gerull, B.A.A. Peggy Jurimae, B.A.
Citizens for Decent Literature	J.K. MacKenzie Various written comments from concerned citizens from London and area —Signatures totalling 1,069 names
Citizens Concerned for Community Values	Rev. J. Kirk Rev. Alan Ahlgrim S. Blanken Rev. L.D. Campbell Rev. J. Crumpler Monty Lobb Rev. Clyde Miller Rev. Hugh Rosenberg Rev. Harold Russell Rev. E.O. Thomas Cathy Woods
Central Committee of Catholic Women's League of Canada, London	Sheila M. Coughlan (Representing approximately 1,719 women)
Prof. W.K. Fisher, Department of Psychology, University of Western Ontario	
Stephen Males	
Donald Huffman, Jr. Port Elgin, Ontario	
Anglican Diocese of Huron	John J. Robinson (on behalf of 90,000 active members of Anglican Diocese of Huron)

Uniondale Women's Institute	Irene Robinson, President Robert Smith, Secretary
St. Mary's (Ont.) Coalition Against Pornography	Margaret McBride Kathy Monks-Leason
B.H. Barrett	
Nancy Muller and S. Muller	

Non-Appearing Submissions:

The Church in Society Committee of the Middlesex Presbyterial United Church Women	Joan Mitchell Bernice Santor Marie Campbell Phyllis Hanna Endorsed by a Petition totalling 143 signatures
D.B. Andrews, Superintendent Criminal Investigation Division	
Doris Moore for P.C. McNorgan City Clerk	

NIAGARA FALLS, ONTARIO

February 9, 1984

Presentation by:

Catholic Women's League of Canada	Jacqueline Herman Janice DesLauriers Verna Morgan Vivian Malouin Joan Bell Barbara Telesnicki
Social Planning Council of Niagara Falls	John Walker Study Group: John Carson Isabelle Boild Gary H. Enskat Dr. Keith Knill Dianne Sheppard Emma Spironella Stacey Schmagala

Positive Action Committee Downtown Board of Management	Michael Halle Mark McCombs
C.A.R.S.A. Inc., Niagara Region Sexual Assault Centre	Cindy Davis
Ed Mitchelson	
Patrick Cummings, Acting Mayor of Niagara Falls	Endorsed by: Donald Harris, Chief of Police
Superintendent of Police	James Moody Also Brief by: Sgt. George McGloin Cst. Kenneth Conhiser
Local Council of Women	Margaret Harrington
Thomas Prues League	
Chamber of Commerce	Bill Thompson, President
Joe Hueglin, M.P.	Michael Halle
The Federal Progressive Conservative Women's Caucus of Niagara Falls	Bonnie Gillings

Non-Appearing Submissions:

Lioness Club of Georgetown	Endorsed by: Signatures of 23 members

WINDSOR, ONTARIO

February 10, 1984

Presentation by:

The Salvation Army	Capt. William Blackman Capt. Neil Watt Lt. Aldo Di Giovanni
Windsor Coalition Against Pornography	Anne McIntyre Rose Voyvodic Sheelagh Conway Lenore Langs Maryellen MacGuigan
Students for the University of Windsor School of Social Work, Human	Rose De Rosa Antoinette De Troia

Sexuality Course of Dr. Kumar Chatterjee	Michelle Goudreau John Loewen Kathy Moran (Including 158 additional University of Windsor Students, Non-Appearing)
James Meredith	
Rev. Donald Bardwell (Chalmers United Church)	
The Elizabeth Fry Society of Kingston	Felicity Hawthorn Liz Elliot
The Catholic Women's League of Canada (London Diocese)	Betty Scherer
Ian Benson (Law Student)	

MONTRÉAL, QUÉBEC

February 27, 1984

Presentation by:

Concordia (University) Women's Collective	Dame Maria Peluso Students: Isabel Bliss Joanne Poirier Leeanne Francine Catherine Easels
Denis Côté	
Service de police de la Communauté urbaine de Montréal	André DeLuca, directeur Guy LaFrance, avocat
Centre de services sociaux Ville-Marie	Laurier Boucher Mike Godman Kathy Faludi
Suzanne de Rosa	
Rassemblement des citoyens et citoyennes de Montréal	Jean Doré, President Cathleen Verdun John Gardiner Barbara Carie
Centre de recherche — Action sur les relations raciales	Fo Niemi, Executive Director Kevin Cadloff, Legal Counsel

Ben Wilson-Williams

Normand Montminy

Judith Dobbie

Non-Appearing Submissions:

Le Comité de la protection de la jeunesse	Tellier Béranger
Mayor Drapeau, M^e Allard, M^e Laliberté for City of Montreal	
Canada Customs from Montréal	Vital Marin Roger Barron
Montreal Citizenship Council	Margaret A. Dvorsky, President
Eastern Orthodox Clergy Association	Archpriest Antony Gabriel, President
La Fédération des Unions de familles Inc.	André Buhl Président
Marielle Landry, Présidente Comité d'Information et d'action anti-pornographie	

MONTRÉAL, QUÉBEC

February 28, 1984

Presentation by:

Bruno Tousignant Proprietor of Club Video Fantastique	
Regroupement féministe contre la pornographie	Diane Bronson Élise Massicotte
Dame Monica Matte	
La Fédération des femmes du Québec	Ginette Busque Suzanne De Rosa Noëlle-Dominique Willems
Conseil de la Famille Richelieu - Yamaska	Helen Petit Pierrette Perreault

Le Conseil des femmes de Montréal	**Emily Dubé Aimée Williams**
Fraternité des policiers de la Communauté urbaine de Montréal Inc.	**Réal Déry Gilles Massé Président**
Association nationale de la femme et le droit	**Suzanne Boivin**
Sabrina Vézina	
Jacques Cimon	
Le centre des services sociaux du Montréal métropolitain	**Thérèse Wiss Thérèse Johnson Denis Ménard**
L'Association féminine d'éducation et d'action sociale	**Lise Paquette Lise Houle Johanne Des Rosiers Alice Buttel**
Eric Johnson	
Diane De Rase Bonne	

MONTRÉAL, QUÉBEC

February 29, 1984

Presentation by:

Deborah Seed Department of Humanities John Abbott College	**Endorsed by: Alan Silverman Renée Lallier Patricia McGraw Sharon Rozen-Aspler Marcia Kovitz Bert Young Carolyn Henderson**
Collectif masculin contre le sexisme	**Alan Besré Denis Laplante**
Emergency Committee of Gay Cultural Workers Against Obscenity Laws	**Thomas Waugh Jose Arroyo**

Elana Medicoff	
Montreal Actra Women's Caucus	Linda Lee Tracy Ardyn Rishpan Kelly Ricard
Comité des ex-détenues	Marcelle Grondine
Jean-François Larose	
Fernand Tremblay	
Marcelle Brisson Professeur au C.E.G.E.P. Ahuntsic	

Non-Appearing Submissions:

Comité contre la pornographie à Ripon	Dame Nathalie Duetam El Mascotto
L.S. Jayasooriya	
Women's Collective to Overthrow the Patriarchy	
Cécile Richard Adjointe administrative	
André Guérin Président du Bureau de surveillance du cinéma et directeur de l'Office du film du Québec	
Stuart Russell	
Germain Trottier Prof., Laval University	
Women Against Pornography	Beabea Jones
Comité de lutte contre la pornographie de Châteauguay	Alice Herscovitch Nicole Ladouceur Marjolaine Dufort Christine Poirier Denise Filion Louise Dufort Patricia Gauthier Michelle Lalonde

SHERBROOKE, QUÉBEC

March 1,1984

Presentation by:

Lennoxville and District Women's Centre	Rina Kampeas
L'Escale de L'Estrie Inc.	Danielle Houle Dominique Gagné
Le Centre d'Aide et de Lutte contre les agressions à caractère sexuel, au nom du Regroupement québécois des Centres d'Aide et de lutte contre les agressions à caractère sexuel	Diane Lemieux
L'Association féminine d'éducation et d'action sociale, région de Sherbrooke	Pauline Paradis
Pierre Gagné Head of Psychiatry, Sherbrooke Hospital	
Arlene and Pierre Schiettekatte	
Professor René Turcotte Faculty of Law University of Sherbrooke	

VAL D'OR, QUÉBEC

March 1, 1984

Presentation by:

Les femmes de Senneterre	G. Trudel Martine Gendron (No Written Brief)
La cause d'elle	A.M. Bebard M. St-Germain
Knights of Columbus	Ivan Boucher Edgar Wait
Le Collectif "Alternative pour elles" de Rouyn-Noranda	Mychèle Balthazard Chantal Genesse

	Carole Bouffard Denise Stewart Marie Brunelle Louise Delisle
U.Q.A.T. La Sarre	Serge Tessier Suzanne Baril-Lavigne Ghislaine Camirand Solange Morin-Lavoie Michel O'Dowd Madeleine Paré Danielle Simard-Gagnon
Pétition des femmes de l'Abitibi-Témiscamingue Madeleine Lévesque	Endorsed by: Signatures of 432 Concerned Citizens
Mission Pentecôte	Bruce Muirhead
Groupe Renaissance	Normand Tremblay

QUÉBEC CITY, QUÉBEC

March 2, 1984

Presentation by:

Le regroupement des femmes de la région de Québec contre la pornographie	Diane Grenier
Le groupe d'hommes contre la pornographie et l'exploitation sexuelle	Jean Lemarre
La Fédération des femmes du Québec, Conseil régional Saguenay Brief and Annexes	Marthe Vaillancourt Antoinette Dubé
Paul Beaulé	
L'Armée du Salut de la Ville de Québec	Major Stuart Booth Major S.W. Booth Joy Rennick Arthur R. Pitcher
Le Réseau d'Action et d'Information pour des femmes (R.A.I.F.)	Marcelle Dolment

Pierre Maranda Nicole Coquatrix Laval University	
Le groupe d'hommes contre la pornographie et l'exploitation sexuelle	Geoffrey Edwards
Roger Delorme	
Camil Aubin	

Non-Appearing Submissions:

Fran Shaver
Research Consultant
Laval, Quebec

Robert Dufault

CHARLOTTETOWN, PRINCE EDWARD ISLAND

May 7, 1984

Presentation by:

Media Watch, P.E.I.	Margaret Ashford
Canadian Congress for Learning Opportunities For Women (C.C.L.O.W.)	Bea Mair John MacFarlane Heather Orford (Director C.C.L.O.W.)
Transition House Association	Joanne Engs
P.E.I. Women's Liberal Association	Dorothy MacKay
Canadian Federation of University Women	Daphné Dumont
Charlottetown Business and Professional Women's Club	Evelyn Matheson
Federated Women's Institute of P.E.I.	Doris Worth
Ad Hoc Committee on Pornography	Janice Devine
The Advisory Council on the Status of Women of P.E.I.	Delores Crane Ruth Power

Catholic Women's League	Mona Doiron Rev. Wendell MacIntyre Phyllis Quinn Elaine Gallant Helen Macisaac

Non-Appearing Submissions:

Beth Percival, Ph.D.
University of P.E.I.
Charlottetown, P.E.I.

VICTORIA, BRITISH COLUMBIA

April 2, 1984

Presentation by:

Rosemary Brown, M.L.A., Brief	
City of Victoria	Alderman Gretchen Brewin Georgene Glover
Canadian Federation of University of Women - and -	Margaret Strongitharm
The University Women's Club of Victoria	Sharon Vipond Victoria Pitt
Prof. Charles B. Daniels, Philosophy Dept., University of Victoria	
People Opposed to Pornography	Janet M. Baird Lynne McFarlane Pat Webber Endorsed by 7 Signatures of Concerned Citizens
Anglican Diocese of B.C., Diocesan Program Committee	Gregg Perry Dianne Taylor Maureen Franks Endorsed by: H.J. Jones, Bishop and Executive Council of the Anglican Diocese of B.C.
Women Against Pornography	Susan Isomaa Pam Blackstone Rebecca Pazdro

Laurence E. Devlin Brishkai Luna	
Victoria Status of Women Action Group	**Avis Rasmussen** **Diana Butler** **Josephine Adams** **Shirley Avril** **Office Coordinator**
B.C. Public Interest Research Group	**Alison LeDuc** **Mercia Stickney**
Vancouver Island Co-Operative Pre-School Association	**Jack Dorgan**
Concerned Citizens Action Group Against Pornography	**Murray and Rita Coulter**
Dorothy Smith	
B.C. Association of Social Workers	**Chris Walmsley** **Jocelyn Gifford**

Non-Appearing Submissions:

Catholic Women's League Sacred Heart Council Victoria, B.C.	
Police Perspective on Prostitution and Soliciting	**Supt. D.E. Richardson**
Anthony Burke Victoria Civil Liberties Association	
Raymond Lee	
B.C. Conference of the United Church of Canada	

VANCOUVER, BRITISH COLUMBIA

April 3, 1984

Presentation by:

City of Vancouver	**Mayor Mike Harcourt** **Alderman Libby Davies** **Chris Warren, Social Planning Council**

B.C. Civil Liberties Association	Dr. John Dixon Dr. Bob Rowan
Red Hot Video Ltd.	Mark Dwor, Counsel
Working Group on Sexual Violence	Francis Warrerlein Kate Andrew
British Columbia Teachers' Association	Jane MacEwan Marcia Toms
Jancis Andrews	Brief Sponsored by: 16 additional names and addresses of concerned citizens
Vancouver Status of Women	Pat Feindel
Vancouver Association of Women and the Law	Heather Holmes Linda King Laura Parkinson Deborah Strachan
Anglican Church of Canada, Diocese of New Westminster Task Force on Pornography	Margaret Marquardt
University Women's Club of Vancouver	Catherine A. Stevenson
Port Coquitlam Area Women's Centre	Karen Phillips
North Shore Women's Centre	Donna Stewart
United Citizens for Integrity	Rev. Bernice Gerard
West Kootenay Women's Assn.	Surindar Dhaliwal Rena Armstrong
Daryl Nelson C.R.O.W.E. (Concerned Residents of the West End)	Richard J. MacKinnon
Knights of Columbus, B.C. and Yukon State Council	
Vancouver Council of Women	Helen Totarek Margaret Pigott Pat Hutcheom Bernece Williams Doris Mellish
Vancouver Archdiocesan Council Catholic Women's League	Rose Kamm

University Women's Club of South Delta	
Media Watch	
British Columbia Provincial Women's Institute	Ruth Fenner
The Corporation of the District of Central Saanich	F.B. Durrand
B.C. NDP Women's Rights Committee	
P. Condie	
R. Moeliker	
R.L. Stirling Dept. of Consumer Affairs	
National Watch on Images of Women in the Media Inc.	Lucy Alderson Project Coordinator
Brian D. Robertson	
P. Susan Penfold Assoc. Prof. Division of Child Psychiatry	
Linda King	

REGINA, SASKATCHEWAN

April 4, 1984

Presentation by:

City of Saskatoon	Mary Cliff Wright Mayor Clifford
Alderman Donna Birkmaier, Saskatoon	
The Feminist Research Group	Mary Wilson Sally Chaster
Saskatchewan Action Committee on the Status of Women	Palma Anderson, President Arlene Franko Susan Duzl

Regina Council of Women	Marion Beck Jacquie Hogan Rita Labiola
Saskatoon Committee Against Pornography	Pat Lorje
Saskatchewan Federation of Women	Sally Hitchins Betty Lepke
Christian and Missionary Alliance Churches	Rev. Richard Sipley
Y.W.C.A. of Saskatoon	Ruth James Marie Dunn Gwen Anderson Marie Kiskchuk
Swift Current Council of Women et al	Jean E.M. Read Marlene Hoffert

Non-Appearing Submissions:

Ukranian Catholic Women's League of Canada	Adeline Dudar Jean Saran Chuk

WINNIPEG, MANITOBA

April 4, 1984

Presentation by:

Manitoba Action Committee on the Status of Women	Lydia Giles Caroline Garlich Penny Mitchell Pam Jackson Sherry Dangerfield
Y.W.C.A. of Winnipeg	Georgia Cordes Dale Unruh Bernice Sisler
Thunder Country Jaycees	Nancy Doetzel
The Children's Home of Winnipeg	Sel Burrows Vera Steinberger Linda Trigg (Social Policy Committee)
Catholic Women's League of Canada, National Council	Evelyn Wyrzykowski
Concerned Morality League	Bernadette Russell

Manitoba Advisory Council on the Status of Women	Jennifer Cooper Roberta Ellis
Men Against Sexism	Bruce Wood
Manitoba Women's Institute Brief prepared by:	Gwen Parker Louis Neabel
University Women's Club of Winnipeg	Susan Currie Nina C. Phillips, President
Communist Party of Canada	Paula Fletcher Manitoba Provincial Leader D. Davis Paul Madock
Inter-Agency Group	Clark Brownley Endorsed by: 18 Signatures from Concerned Citizens

Non-Appearing Submissions:

T.L. Coles, Instructor
Anthropology Dept.
University of Winnipeg

Don Mills, President
Manitoba Library Association

Elsie Jawolik

Robert Ellis, Chairperson
Manitoba Advisory Council
on the Status of Women

Stella Carson

Judy Holden
Public Affairs Chairman
Junior League of Winnipeg

REGINA, SASKATCHEWAN

April 5, 1984

Presentation by:

Regina Women's Centre and Sexual Assault Line	Abby Ulmer

Regina Evangelical Ministerial Association	Rev. Wayne Kerr Rev. Ross Ingram
Catholic Women's League of Canada, Saskatchewan Provincial Council	Claire Heron Fern Foster
Ernest Lyon Estevan, Saskatchewan	
Saskatchewan Human Rights Commission	Ron Kruzinski, Chief Commissioner Shelagh Day, Executive Director
Steve Selenski	
City of Regina	Mayor Larry Schneider Raymond Tessier
L.R.S.	Ron Richmond, Associate Prof. of Education University of Regina
Government of Saskatchewan	Hon. Pat Smith Hon. Gary Lane Hon. Gordon Dirks

Non-Appearing Submissions:

Jean Baptiste John L. de Bruyne	
Jean E.M. Reid	Endorsed by: List of 642 signatures from various organizations
Miron Balych	
Saskatchewan Women's Institutes	Margaret E. Peterson, Executive Secretary
Catholic Women's League of Canada	Evelyn Wyrzykowski
L.A. Copeland	
University of Regina Dr. Agnes Groom	
Lorraine Samborsky Canadian Federation of University Women	

WINNIPEG, MANITOBA

April 5, 1984

Presentation by:

Réseau	Janick Belleau
Wayne Sowden	
Klinic, Inc.	Brenda L. Johnson
Manitoba Teacher's Society	Audrey Burchuk, Chairperson, Status of Women in Education Committee
ACTRA	Alice Porper Edward Ledson Brief by: Margaret Allan
Ukranian Canadian Women's Committee	Dorothy Cherwick, President Vera Werbeniuk, President
Mother's Union of the Anglican Church of Canada	Marion Lepinsky, President
P. Snowdon	

Non-Appearing Submissions:

Council of Women of Winnipeg	Rosemary Malahar, President
Seven Oaks School Division #10	N.P. Isler
Manitoba Association for Rights and Liberties	J.J. van der Krabben, President

OTTAWA, ONTARIO

April 6, 1984

Presentation by:

Canadian Civil Liberties Association	Alan Borovoy General Counsel; Prof. Louise Arbour, Board Member
City of Ottawa	Mayor Marion Dewar

Canadian Advisory Council on the Status of Women	Lucie Pepin, President; Jennifer Stoddart, Director of Research Merilee Stephenson, Chief Researcher
Periodical Distributors of Canada	Gerald Benjamin, President Ron Thomas, Counsel Tobi Levinson, Ontario Advisory Committee
Canadian Association of University Teachers	Dr. Sarah Shorten, President Dr. Donald Savage, Executive Director
Ontario Advisory Council on the Status of Women	Sheila Ward, Vice-President Gail Hutchinson
Dianne Kinnon Cynthia Manson	
Canadian Library Association	Paul Kitchen Lois M. Bewley, President
Canadian Conference of Catholic Bishops	Bishop James MacDonald
Public Service Alliance of Canada	Pierre Samson, President Bonnie Carroll Susan Kilpatrick Steven Chilkenny
Lynn McDonald, M.P.	
Video Retailers' Association	James Sintzel Kathleen Curry
Non-Appearing Submissions:	
Mary Nickson, President Council of Women of Ottawa and Area	
The Canadian Home Economics Association	Diana Smith Executive Committee
Editorial Advisory Board Goodwin's Magazine	Donna Balkan

OTTAWA, ONTARIO

April 7, 1984

Presentation by:

Comité contre la pornographie à Ripon	Nathalie Duhamel Mascotto
Federated Women's Institutes of Canada	Alice McLaggan Bernice B. Noblitt, President
Canadian Coalition Against Media Pornography	Cynthia Wiggins, President Rose Potvin
Canadian Teachers Federation	Brian Shortall, President Dr. Stirling McDowell Sylvia Gold
The Hastings-Prince Edward County Roman Catholic Separate School Board	Gerald Bibby, Chairman Principals' Association Sister Mary Joan
Gays of Ottawa	Blair Johnston Barbara McIntosh
Group of Concerned Parents in Ottawa	Bruce Pringle
Roots and Wings	Inez Berg

Non-Appearing Submissions:

Ottawa Women Fight Pornography (OWFP)	
Ottawa Council for Low Income Support Services	
Randal Marlin	Associate Prof. Carleton University

ST. JOHN'S, NEWFOUNDLAND

May 7, 1984

Presentation by:

Provincial Advisory Council on the Status of Women, Newfoundland and Labrador	Ann Bell, President Dorothy Robbins Jennifer Mercier

The Newfoundland Teachers' Association	Grace Howlitt Barbara Lewis
Citizens' Coalition Against Pornography	Dr. John Lewis Judy Facey
Community Against Pornography	Sharon Parsons-Chatman Cynthia O'Toole Joanne Cranston Kathy Porter
Dorothy Inglis Vice President N.A.C.	
Archdiocesan Pastoral Council Roman Catholic Diocese of St. John's Newfoundland	Sister Lorraine Michael Brian F. Furey
Newfoundland and Labrador Women's Institutes	Angela Sullivan — 1st Vice President Jennifer Perry — Executive Director Patty Martin — Convener
The Salvation Army Newfoundland	Major Margaret Hammond
The Canadian Catholic School Trustees' Association	Molly Boucher Frank Furey
The Newfoundland Status of Women Council	Pauline Stockwood Beth Lacey
Newfoundland Provincial Council Catholic Women's League of Canada	Val McNiven Catherine Power J.W. Allen Iris Kendall
Archdiocese of St. John's Family Life Bureau	Margaret Bruce Tom Milla

Non-Appearing Submissions

Cornerbrook Satus of Women Council	Marie Furlong-Bass
St. John's Status of Women Council	Judith Skidmore
Newfoundland and Labrador Women's Institutes	Jennifer Perry Executive Administrator

Newfoundland Assoc. of Social Workers	Nancy Forsey Wanda Lundrigan Pres. N.A.S.W.
Newfoundland & Labrador Assoc. of Youth Serving Agencies	D. Paul Althouse, President

FREDERICTON, NEW BRUNSWICK

May 8, 1984

Presentation by:

St. John and District Ministerial Association	Rev. Ramon Hunston Rev. Mel Norton Malcolm Berry Rev. Roy Campbell
Max M. Wolfe	
People Opposing Pornography	Timothy Johnson
La Fédération des dames d'Acadie	Rachel Guérette
Federation Clergy Council	Eleanor Johnson
Kathy Royama	
New Brunswick Advisory Council on the Status of Women	Madeline Le Blanc, Presidente Myrna Richards, Vice President Elspeth Tullock, Researcher
Carlton-Victoria Association of the United Baptist Churches	Rev. N.W. MacKenzie, Chairman Pastor Steven Mullin Margaret McIsaac
Saint John Deanery of the Anglican Diocese of Fredericton	Archdeacon Harry Quinn Rev. Christopher Pratt Endorsed by: Harold J. Nutter, Archbishop
Association des enseignants francophones du Nouveau-Brunswick	Rosemarie Coule, President Nicole Dupéré
Saint John Chapter, Canadian Federation of University Women	Jane Barry
Catholic Women's League New Brunswick	Rita Milner Kay Robinson

Arthur Standing

Tom Evans

Lea Robichaud

Non-Appearing Submissions:

Women's Institute New Brunswick	Bernice Noblitt, President
Board of School Trustees School District Number 20	Anne Marie McGrath Assistant Superintendent
Asst. Superintendent Board of School Trustees	Dale Horncastle

HALIFAX, NOVA SCOTIA

May 9, 1984

Presentation by:

Mayor Ron Wallace, Halifax	
Atlantic Provinces Library Association	Terry Paris Andre Guay Elinor Benjamin Gerard Lavoie John Mercer Janet Phillipps
Prof. Richard Beis	
Voice of Women of Nova Scotia	Elizabeth Mullaby
P.C. Women's Association of Nova Scotia	Gloria Marshall, President
Nova Scotia Advisory Council on the Status of Women	Francene Cosman, President
Downtown Halifax Residents' Association	Mila Riding Elizabeth Pam Piers Howard McNutt
Lloma Jane Chase	
Le Conseil des Acadiennes de la Nouvelle-Écosse	Alphosine Saulnier Denise Sancon

Social Action Committee Antigonish Women's Association	Donna Wallaver Lucille Sanderson Pat Halper

Non-Appearing Submissions

John Poag	
St. John The Evangelist Mothers' Union, Lower Sackville Nova Scotia	Geraldine Connors
North End Area Council Halifax	
Family Life Council	
Diocese of Nova Scotia Rev. Lewis H. How	
Dalhousie Legal Aid Service C. Birnie	
Gerald B. Freeman	
J.W. Clattenberg Municipal Clerk (Pictou)	
Gilles G. LeBlanc	
Dale Godsoe, President Y.W.C.A.	
Prof. John Fraser Department of English Dalhousie University	

HALIFAX, NOVA SCOTIA

May 10, 1984

Presentation by:

R.C. Archdiocese of Halifax Nova Scotia	Archbishop James M. Hughes
Pictou County Branch, Canadian Federation of University Women	Penny Mott Pamela MacDonald

Libby Fraser Charmaine Wood	Endorsed by: Session J. Wesley Smith United Church Halifax
Robert Bean Grant MacDonald Neil Purcell Ken Ward Jim Drobnick Jim McCalla Smith Michael Welton George Peabody Doug Meggison John Bouris Steve Campbell	
Student Union Women's Committee Nova Scotia College of Art and Design	Karen Fainman Barbara Lounder Liz MacDougall
Nova Scotia Association of Social Workers	Freda Bradley Norma Jean Profitt
Francene Cosman	
Nova Scotia Branch Canadian Research Institute for the Advancement of Women	Barbara Cottrell Adele McSorley Susan Shaw
Prof. Clare F. Beckton	
Planned Parenthood of Nova Scotia	Katherine McDonald, President Mary Hamblin, Executive Director Endorsed by: Marilyn R. Peers C.A.S. of Halifax
Group from Atlantic School of Theology	Gordon MacDermott Joyce Kennedy Endorsed by: The Signatures of 49 Citizens
Jill Robinson	

Non-Appearing Submissions:

Nova Scotia Provincial Council of the Catholic Women's League	Doreen MacDonnell Msg. J. Niles Theriault, Spiritual Director

Peter Clark Anthony Davis (Dalhousie University)	
P.C. Women's Association of Nova Scotia	Gloria Marshall
Public School Responsibility Unit of the Program Committee — Diocese of Nova Scotia	Rev. Lewis How
Mount Saint Vincent University Re: The Institute for the Study of Women	Christine Ball
Donald J. Weeren (Associate Prof. of Education at Saint Mary's University)	
William Morse, M.D., C.M. F.R.C.P.(C) Jean M. Morse, B.Sc., M.S.W.	

THUNDER BAY, ONTARIO

June 19, 1984

Presentation by:

The Northwestern Ontario Women's Centre — Thunder Bay	Fiona Karlsteot Margot Blight Endorsed by: —Social Action Committee, Cambrion Presbytery, The United Church of Canada —The Faye Peterson Transition House —Crisis Homes Inc. —Northwestern Ontario Women's Decode Council
Lakehead Evangelistic Association	Rev. Roy Kemp Rev. Ron Ashton
City of Thunder Bay Police Force	Inspector John Boulter
Dr. Ruth Kajander, Psychiatrist	
Thunder Bay Council of Clergy	Kerry Craig

	Rev. Richard Darling Anne K. McLaughlin, Director of Communications Roman-Catholic Diocese of Thunder Bay
Murray R. Gadica	
Joan Skelton (Chairperson, Committee Against Harmful Pornography	Endorsed by: —Petition of 5,068 signatures —City Council of Thunder Bay —Lakehead District Separate School Board —Lakehead Board of Education —Federation of University Women of Thunder Bay —C.U.P.E. Local 2486 —Lakehead Women Teacher's Association —Office & Professional Employees International Union —Ontario Federation of Home and School Assoc. —Ontario Public School Teachers' Federation —Ontario Secondary School Teachers' Federation
Blake Kurisko, Law Researcher	
Lakehead Board of Education	Susan Braun, Chairperson Dr. Riley Moynes
Committee on Outreach and Social Action, United Church of Canada	Mel MacLachlan

Non-Appearing Submissions:

Thunder Bay Public Library	Gerry Meek Lois M. Bewley, President Canadian Library Association
The United Church of Canada Cochrane Presbytery	Rev. William Ferrier, Secretary
Jack Masters, M.P. (Thunder Bay, Nipigon)	
J.A. MacDonald Secretary-Treasurer, Northwestern Ontario Municipal Association	

YELLOWKNIFE, NORTHWEST TERRITORIES

June 19, 20, 1984

Presentation by:

Y.W.C.A. of Yellowknife	Michele Boon Eya Lewycky Lynne MacLean Lynn Saunders
Dennis Patterson	Member of Legislative Assembly, N.W.T.
Sheila Keete	Co-Ordinator, Women's Bureau, N.W.T.
Media Watch, N.W.T.	Jean Wallace
Bob MacQuarrie Member of Legislative Assembly	
Native Women's Association	Violet Erasmus
Foster Family Association of Yellowknife	Nancy Harrison
Anglican Church of Canada — N.W.T.	Bishop John Sperry
Rev. Henry Barch	
Yellowknife Catholic School Board	Paul Driscol

WHITEHORSE, YUKON

June 21, 1984

Presentation by:

Yukon Status of Women Council Media Watch	Sharon Hounsell Vera Blackwell
Whitehorse United Church Social Justice Committee	Trevor Martin Helen Bebak Blair Kirby Rosemary Cormie

Hopkins (N.A.C. Executive Member)	
Government	Chris Pearson, Government Leader Bill Klausen, Health & Human Resources Lorrie McFeeters, Women's Bureau Bob Cole, Acting Administration Justice Pat Harvey, Corporate and Consumer Relations Jill Thomson, Intergovernmental Relations Officer
Official Opposition	Tony Penikett, Leader Roger Kimmerley, MLA